



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims

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Twenty-fourth Report of Session  
2008–09

*Report, together with formal minutes and oral  
and written evidence*

*Ordered by the House of Lords  
to be printed 21 July 2009  
Ordered by the House of Commons  
to be printed 21 July 2009*

**HL Paper 153  
HC 553**

Published on 11 August 2009  
by authority of the House of Commons  
London: The Stationery Office Limited  
£0.00

## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

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International conventions allow and in some cases oblige the Government to give our courts criminal jurisdiction over the world's most heinous crimes, including genocide, war crimes, crimes against humanity, torture, and hostage-taking. However, the Government has chosen not to implement those conventions to the full extent possible, leaving inconsistencies and gaps in the law. These gaps effectively provide impunity to international criminals, allowing them to visit and in some cases stay in the UK without fear of prosecution.

The Government has also chosen not to give the courts jurisdiction to allow victims of torture to sue the foreign states who tortured or approved torture. The Torture (Damages) Bill would provide an exception to state immunity for torture and therefore allow torture victims to pursue their torturers for reparations, even if the torturers are states or states' agents.

The Government should ensure the full force of UK law is behind victims of international crimes. Genocide, crimes against humanity and war crimes in internal armed conflicts should be criminal offences backdated to the dates when they were recognised as criminal offences in international law. Suspects should be liable to arrest if found in the UK, regardless of whether or not they are technically resident here.

The Government should create an exception to the state immunity rule for torture, just as it has done for property and employment disputes involving foreign states. Whilst the UK has universal criminal jurisdiction to prosecute those alleged to have committed torture abroad, it has not legislated for equivalent civil jurisdiction – but it could. Victims of torture are entitled to seek reparations under international law. The Government should legislate to allow British torture victims to pursue torturing states for damages. The Torture (Damages) Bill would have this effect. The Government should therefore support it.



# 1 Introduction

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## Background

### *UK law regarding genocide and related crimes*

1. Over the last century, the international community has agreed that genocide, war crimes (in both international and internal armed conflicts), crimes against humanity, torture and hostage-taking are criminal offences of a particularly egregious nature, which require the extension of the domestic courts' normal jurisdiction to ensure that perpetrators are brought to justice, wherever they may be.

2. These crimes are defined by separate international instruments and, as a result, are dealt with in a piecemeal and inconsistent fashion in UK law. Suspects of genocide, for example, may visit the UK without fear of arrest, but suspects of torture may not. Suspects against whom a case has been made sufficient to warrant their extradition to Rwanda for trial continue to live comfortably in the UK because UK courts have found that the Rwandan criminal justice system would not offer them a fair trial.

3. Despite recognising the “difficulties” with the existing law, the Minister, Clare Ward MP, defended the Government’s long-held position against extending jurisdiction over genocide, crimes against humanity and war crimes in civil wars retrospectively, when she gave oral evidence on 1 July.<sup>1</sup> One week later, on 7 July, the Secretary of State for Justice announced that the extra-territorial jurisdiction of UK courts over genocide, crimes against humanity and war crimes in civil wars would be made retrospective to 1991, and that they would consider the need to more clearly define the ‘residence’ requirement.<sup>2</sup> We are pleased that the Government has reconsidered the need for law reform but we are unable to consider the details of the Government’s proposals in depth because they will be published in the autumn. We have also not had a chance to call for further evidence on this development, although we have received a short supplementary memorandum from the Aegis Trust.<sup>3</sup>

4. In this report, we consider the reasons for the existing anomalies in UK law and their practical consequences. We comment on the Government’s recently announced policy change, and make recommendations aimed at removing what amount to impunity gaps for the world’s worst criminals.

### *Reparations for torture victims*

5. The UK has universal jurisdiction to prosecute individuals suspected of committing torture abroad after 1988, under the Criminal Justice Act 1988.<sup>4</sup> However, victims cannot

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<sup>1</sup> Q62, Q66, Q68; Q59-Q80.

<sup>2</sup> The Secretary of State, Jack Straw’s Written Ministerial Statement was on the Coroners and Justice Bill, which the Government intends to amend at the Report Stage in the House of Lords to amend the International Criminal Court Act 2001.

<sup>3</sup> Ev 23

<sup>4</sup> See para 13 and footnote 5 for the definition of ‘universal jurisdiction’.

get compensation by suing foreign governments for torture: states are immune from the civil jurisdiction of domestic courts under the State Immunity Act 1978.

6. There are numerous exceptions from state immunity under the 1978 Act, including for employment and property disputes. Article 14 of the UN Convention Against Torture (UNCAT) recognises the right of torture victims to reparations. International law regarding state immunity is developing; while extra-territorial civil jurisdiction is not currently *required* of states, states are arguably *permitted* to provide their courts with such jurisdiction. The Government could therefore legislate to create extra-territorial civil jurisdiction through the Torture (Damages) Bill.

7. In this report, we examine the existing state of affairs in the UK regarding reparations for torture victims. We make recommendations aimed at realising the rights of torture victims to compensation and rehabilitation.

## Our inquiry

8. The Committee issued a call for evidence on 4 February 2009 seeking evidence on the following:

- the number of prosecutions under the Genocide Act 1969, the Geneva Conventions Act 1957 and the International Criminal Court Act 2001 for genocide, war crimes and crimes against humanity offences committed abroad, and their outcomes;
- the number of suspected perpetrators of genocide, war crimes and crimes against humanity present in the UK who cannot be prosecuted because of the date the crimes occurred or because they are not resident in the UK;
- the rationale for the differences in the legal regimes applying to the offences of genocide, war crimes and crimes against humanity committed abroad; and
- whether the law should be changed to ensure it is more consistent and what the practical consequences of change might be, for example in terms of police resources required to investigate such crimes.

9. In addition, we decided it would be fitting to consider the jurisdictional issue addressed by the Torture (Damages) Bill, which passed the House of Lords in 2007-08 and was introduced in both Houses during the current parliamentary session but which has not yet reached the statute book.

10. In response to the call for evidence, we received 13 memoranda, which we publish with this report. We took oral evidence on 19 May from the former Director of Public Prosecutions, Sir Ken Macdonald QC, Nick Donovan from the Aegis Trust, and Daniel Machover from Hickman and Rose Solicitors. We heard from Kevin Laue of Redress and Clare Ward MP, Parliamentary Under-Secretary of State, Ministry of Justice, on 1 July.

11. We simultaneously conducted a broader inquiry into UK policy on the use of torture and have therefore kept the issues for consideration in this inquiry narrow. In particular, issues regarding the UK's compliance with international law in relation to complicity in torture are considered in our separate report on that inquiry.



## **Structure of our Report**

12. In chapter 2, we provide an overview of the existing international and UK law regarding genocide and related crimes. We examine the inconsistencies of the Government's implementation of international law and the practical implications. We then consider how UK law could be changed to remedy the impunity gaps. In chapter 3, we consider the international and domestic law regarding extra-territorial civil jurisdiction for torture. We then consider proposals for changing the law, in particular the Torture (Damages) Bill currently before both Houses.

## 2 Genocide and related crimes

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### The existing law

13. The UK has ‘universal jurisdiction’ over the crimes of torture, hostage-taking and war crimes in international armed conflicts (‘grave breaches’ of the 1949 Geneva Conventions).<sup>5</sup> In practice, the UK has only exercised ‘extra-territorial jurisdiction’ in relation to these crimes; that is, jurisdiction has only been exercised when the accused has been present in the UK to be arrested.<sup>6</sup> The UK has not legislated for universal jurisdiction over genocide, crimes against humanity and war crimes in civil wars and those crimes have not been subject to the same degree of extra-territorial jurisdiction. This has resulted in inconsistencies in the UK’s capacity to prosecute international criminals.

14. The rationale for the different legal positions stems from the way international law developed. Broadly speaking, the UK has implemented its international obligations as required by international conventions, which have been agreed at different times, reflecting the conflicts of the 20<sup>th</sup> century.

15. Below is an overview of the differences in UK law between these crimes and the reasons the law developed the way it did in each case.

### *Torture*

16. UK law allows prosecution for torture committed after 1988, regardless of where the crime was committed, and whether or not there is any connection to the UK.<sup>7</sup> This implements articles 4 and 5 of the 1984 UNCAT, which required states to establish extra-territorial jurisdiction over the crime of torture. The UK therefore went further than required by establishing universal jurisdiction.

### *Hostage-taking*

17. UK law allows prosecution for hostage-taking committed after 1982, regardless of where the crime was committed and whether or not there is any connection to the UK.<sup>8</sup> This implements the 1979 International Convention Against the Taking of Hostages, which required states to establish extra-territorial jurisdiction over such acts.<sup>9</sup> The UK therefore went further than required by establishing universal jurisdiction.

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<sup>5</sup> ‘Universal jurisdiction’ is the international legal principle whereby a state claims the right to prosecute crimes committed outside its boundaries, regardless of the nationality of the accused or their state of residence. In international law, there need not be any connection with the prosecuting state in order to prosecute certain serious crimes which are considered crimes against all of humanity. A state with full universal jurisdiction over international crimes can request extradition of a suspect from another state even if there is no connection between the suspect (or crime) and the prosecuting state.

<sup>6</sup> In this report, the term ‘extra-territorial jurisdiction’ is used to refer to the principle whereby a state can prosecute its nationals, residents or in certain cases suspects found within its territory for crimes committed abroad; it does not include jurisdiction to apply to another country to have a suspect extradited if there no connection with the prosecuting state.

<sup>7</sup> Section 134, Criminal Justice Act 1988.

<sup>8</sup> Taking of Hostages Act 1982.

<sup>9</sup> Article 5.

### *War crimes in INTERNATIONAL armed conflicts/'grave breaches' of the Geneva Conventions of 1949*

18. UK law allows for prosecution of 'grave breaches' of the Geneva Conventions committed after 1957, regardless of where the crime was committed and whether or not there is any connection to the UK.<sup>10</sup> This implements the Geneva Conventions of 1949, which required states to establish universal jurisdiction over grave breaches in international armed conflicts (not internal armed conflicts).<sup>11</sup>

#### *Nazi war crimes*

19. The War Crimes Act 1991 establishes the extra-territorial jurisdiction of the UK over murder committed in Nazi-occupied Europe between 1939 and 1945. It allows for UK citizens and residents to be prosecuted, but not simply those found on UK territory. This jurisdiction was not required by a particular international convention.

#### *War crimes in INTERNAL armed conflicts*

20. The International Criminal Court Act 2001 ("ICC Act 2001") established jurisdiction over British citizens and residents for war crimes in *internal* armed conflicts ("civil wars"), as well as international armed conflicts, committed after the date the Act came into force in 2001. This is as a consequence of the 1998 Rome Statute of the International Criminal Court ("the Rome Statute"), which places 'serious violations' of article 3, common to the four Geneva Conventions of 1949, on the same legal footing as 'war crimes' in international armed conflicts. The Rome Statute makes all war crimes committed after it came into force justiciable before the International Criminal Court (ICC) where the domestic courts of State Parties do not have jurisdiction.<sup>12</sup> It was therefore against international law to commit war crimes in civil wars from 1949, but international law does not expressly require states to establish extra-territorial jurisdiction over war crimes in civil wars.

21. The UK has no jurisdiction to prosecute suspects found in the UK if they are not British citizens or residents and the crime was committed abroad; and there is no jurisdiction to prosecute acts committed before 2001.

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<sup>10</sup> Geneva Conventions Act 1957.

<sup>11</sup> Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 50 of the Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War; Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War.

<sup>12</sup> The Rome Statute came into force on 1 July 2002, after 60 states had ratified it. It does not explicitly oblige states to establish universal or extra-territorial jurisdiction over war crimes in internal armed conflicts, genocide and crimes against humanity, but it has been interpreted as requiring the expansion of extra-territorial jurisdiction by states, including the UK, over these international crimes so as to stop the ICC from exercising its 'supra-national' jurisdiction. Article 8 of the Rome Statute includes in the definition of 'war crimes' serious violations of common article 3 in conflicts 'not of an international character', "namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention of any other cause:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
2. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
3. Taking of hostages;
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable."

## *Genocide*

22. The Genocide Act 1969 criminalised genocide committed in the UK, in line with the 1948 Convention on the Prevention and Punishment of the Crimes of Genocide (“the Genocide Convention”), which did not oblige states to establish extra-territorial or universal jurisdiction over genocide. In 1998, the Rome Statute gave the ICC jurisdiction over the crime of genocide. For the reasons mentioned in paragraph 20 above, the ICC Act 2001 extended the UK’s jurisdiction to prosecute British nationals or residents for genocide committed abroad after 2001.

23. The UK has no jurisdiction to prosecute suspects found in the UK if they are not British citizens or residents and the crime was committed abroad; and there is no jurisdiction to prosecute acts committed before 2001 unless they were committed in the UK.

24. Mr Machover of Hickman and Rose Solicitors told the Committee that at the time of the Genocide Convention, “diplomats thought there would be an international criminal court and so the concept of universal jurisdiction was not introduced [as a duty].”<sup>13</sup>

## *Crimes against humanity*

25. The ICC Act 2001 established extra-territorial jurisdiction over British citizens and residents for crimes against humanity. There has never been an international convention regarding crimes against humanity, but they are defined in many international texts, including Article 7 of the Rome Statute.<sup>14</sup> There is some consensus that the first official recognition that crimes against humanity are “beyond any doubt part of customary law” was 1 January 1991, when the Statute of the International Criminal Tribunal for the former Yugoslavia was adopted.<sup>15</sup>

26. The UK has no jurisdiction to prosecute suspects found in the UK if they are not British citizens or residents and the crime was committed abroad; and there is no jurisdiction to prosecute acts committed before 2001.

27. The table below summarises the jurisdiction available to prosecute each of these international crimes in the UK, highlighting the inconsistencies between the first group of crimes – war crimes in international armed conflicts, torture, and hostage-taking – and the second – genocide, crimes against humanity and war crimes in civil wars.

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<sup>13</sup> Q11.

<sup>14</sup> Crimes against humanity are defined in Article 7 of the Rome Statute as any of a list of acts “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”; the list includes acts such as murder, enslavement, deportation, torture, and rape.

<sup>15</sup> Secretary-General’s Report on the ICTY Statute, 3 May 1993 (S/25704) para 34.

**Table 1: dates from when UK has jurisdiction to prosecute crimes committed abroad**

<b>Crime</b>	<b>Jurisdiction to prosecute UK residents?</b>	<b>Jurisdiction to prosecute non-residents?</b>
War crimes – international armed conflicts	For acts committed post 1957	For acts committed post 1957
Torture	For acts committed post 1988	For acts committed post 1988
Hostage taking	For acts committed post 1982	For acts committed post 1982
War crimes - Nazis	For acts committed post 1939-1945	None
War crimes – civil wars	For acts committed post 2001	None
Genocide	For acts committed post 2001	None
Crimes against humanity	For acts committed post 2001	None

### *What do the inconsistencies mean in practice?*

28. The staggered development of international and domestic law has resulted in a “patchwork of norms”<sup>16</sup> containing “anomalies” and “gaps”<sup>17</sup> and is described by the former Director of Public Prosecutions, Sir Ken Macdonald QC, as “illogical”.<sup>18</sup> The gaps in the law provide impunity to several categories of international criminals.<sup>19</sup>

### *Impunity for non-residents*

29. Suspects of genocide, war crimes in civil wars, or crimes against humanity who are not ‘resident’ in the UK cannot be prosecuted in the UK under the ICC Act 2001.<sup>20</sup> In practice, this means suspects of these crimes can visit the UK without fear of prosecution, in some cases staying for lengthy periods of time. In contrast, suspects of torture, war crimes in international armed conflicts, or hostage-taking can be arrested and prosecuted if they set foot in UK territory. Israeli General Almog was threatened with prosecution for alleged war crimes in the Palestinian territories (an international armed conflict) under the Geneva Conventions Act 1957 after arriving in the UK for a visit.<sup>21</sup>

### *Impunity for crimes committed pre-2001*

30. Acts of genocide, war crimes in civil wars, or crimes against humanity committed abroad before 2001 also cannot be prosecuted in the UK. In contrast universal jurisdiction

<sup>16</sup> John RWD Jones, Ev 26.

<sup>17</sup> Sir Ken Macdonald, Ev 33.

<sup>18</sup> Ibid. Barrister John R.W.D. Jones also submitted that English law in this regard has ‘little logical basis’, Ev 26.

<sup>19</sup> Sir Ken Macdonald QC, Ev 33; John R.W.D Jones, Ev 26; Aegis, Ev 20; Amnesty International, Redress, Hickman and Rose and FIDH joint paper (available at: [http://www.redress.org/reports/UJ\\_Paper\\_15%20Oct%2008%20\\_4\\_.pdf](http://www.redress.org/reports/UJ_Paper_15%20Oct%2008%20_4_.pdf) hereafter referred to as ‘NGO joint paper’); Redress and African Rights, Open Letter to UK Government on Rwanda Genocide, dated 8 May 2009; Human Rights Watch, Letter to Jack Straw, 12 May 2009, Ev 25.

<sup>20</sup> Section 51(2)(b).

<sup>21</sup> <http://www.independent.co.uk/news/uk/home-news/keeping-the-peace-the-el-al-flight-and-the-israeli-army-officer-784407.html>

over the crimes of torture, war crimes in international armed conflicts and hostage-taking was enacted in the UK relatively quickly after the international community recognised each as crimes (1988, 1957 and 1982 respectively) and therefore suspects can be prosecuted in the UK for acts committed after those dates. In practice, this means charges cannot be brought for genocide, war crimes in civil wars or crimes against humanity committed in several recent conflicts, such as the Rwandan genocide in 1994.

### **Prosecutions in the UK**

31. The Committee asked for evidence regarding the numbers and outcomes of prosecutions for genocide, war crimes and crimes against humanity under the Genocide Act 1969, the Geneva Conventions Act 1957 and the ICC Act 2001.

32. The Government advised us that:<sup>22</sup>

- There were no prosecutions under the Genocide Act 1969 (repealed by the ICC Act 2001).
- There is no record of prosecutions for genocide under the ICC Act 2001.
- There is no record of prosecutions for war crimes under the Geneva Conventions Act 1957.
- Offences under the ICC Act 2001 are not recorded separately so details of cases or their outcomes under that Act cannot be provided.
- There has been one successful prosecution for torture under section 134 of the Criminal Justice Act 1988 for torture committed in Afghanistan in the 1990s (this case also involved a successful prosecution for hostage-taking under the Taking of Hostages Act 1982).<sup>23</sup>

33. We also know that:

- There have been two prosecutions (one successful) for Nazi war crimes under the War Crimes Act 1991.<sup>24</sup>
- In 2003, an application was filed for an arrest warrant for Mr Narendra Modi, Chief Minister of the State of Gujarat, India, under section 134 of the Criminal Justice Act 1988 following allegations of torture.<sup>25</sup>
- In September 1997, a Sudanese doctor working in Scotland, Mohammed Ahmed Mahgoub Ahmed Al Feel, was charged with torture under the 1988 Act. The charges were dropped for insufficient evidence.<sup>26</sup>

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<sup>22</sup> Ev 37.

<sup>23</sup> Sentenced 19 July 2005, appeal denied 7 Feb 2007: *R v Zardad* [2007] EWCA Crim 279.

<sup>24</sup> On 15 April 1996, Szymon Serafinowicz, was charged but was found to be unfit to stand trial. On 1 April 1999, Anthony (Andrzej) Sawoniuk was sentenced to life imprisonment, upheld on appeal on 10 February 2000: *R v Sawoniuk* [2000] Crim. L. R. 506.

<sup>25</sup> NGO joint paper.

<sup>26</sup> *Ibid.*

### ***Suspects in the UK?***

34. We also asked for information on the number of suspected perpetrators of genocide, war crimes and crimes against humanity present in the UK who cannot be prosecuted. In its memorandum, the Government said it could not estimate the number of suspects living in the UK but said that in the four years between 2004 and 2008, there were 138 adverse immigration decisions (such as refusal of entry, indefinite leave to remain and naturalisation, and exclusions from refugee protection), and that “these individuals may no longer be in the UK.”<sup>27</sup> In the same four years, 22 cases were referred to the Metropolitan Police.<sup>28</sup> In its memoranda, Aegis quoted figures provided to Parliament: the UK Borders Agency (UKBA) has investigated 1,863 individuals in the UK for genocide, war crimes or crimes against humanity.<sup>29</sup> Aegis also noted that there may be more suspects living in the UK, given that some will have entered before 2004.<sup>30</sup> Aegis has recently argued that “there are significant numbers of suspected war criminals and genocidaires who are either in the UK or who have visited this country” and published details of suspects from Rwanda, Liberia, Sierra Leone, Sri Lanka, Iraq, Zimbabwe, Sudan, Congo, Afghanistan and the former Yugoslavia.<sup>31</sup>

### **Examining the ‘impunity gaps’**

35. We examined the two main anomalies in UK law, what they mean in practice, and whether there is any justification for retaining the inconsistencies.

#### ***Presence versus residence***

36. As discussed above, the first of the two main anomalies is the difference between the ‘presence’ requirement to prosecute suspects of torture, hostage-taking and war crimes in international armed conflicts, and the ‘residence’ requirement to prosecute suspects of genocide, war crimes in internal armed conflicts or crimes against humanity.<sup>32</sup> A further complicating factor is that the definition of ‘resident’ is unclear. The ICC Act 2001 gives a rather unhelpful definition of a UK resident as “a person who is resident in the United Kingdom.”<sup>33</sup> Sir Ken Macdonald QC told the Committee that “there is no settled definition of what residency amounts to in the English law, and residency means different things in different statutes.”<sup>34</sup> The Government has said:

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<sup>27</sup> Ministry of Justice, Ev 37.

<sup>28</sup> Ibid.

<sup>29</sup> Ev 20.

<sup>30</sup> ‘Suspected War Criminals and Genocidaires in the UK: Proposals to Strengthen our Laws’, Aegis Trust, June 2009 (hereafter referred to as Aegis Trust report). Available at: <http://www.aegistrust.org/images/PDFs/Suspected%20War%20Criminals%20and%20Genocidaires%20in%20the%20UK.pdf>

<sup>31</sup> Ibid.

<sup>32</sup> As noted in paragraph 13, the UK does not technically even require that a suspect is present in the UK in order to prosecute. However, in practice, there has been such a requirement.

<sup>33</sup> Section 67(2).

<sup>34</sup> Q20.



The term ‘resident’ is flexible. It does not include visitors or short-term students, for example. But it might include those who have applied for asylum and are waiting for their applications to be decided.<sup>35</sup>

37. In its written memorandum, the Government insisted that the ‘residence’ requirement does not restrict prosecution in practice:

We do not know of any individuals against whom there is a prima facie case to answer for war crimes, genocide or crimes against humanity, but who have not been able to be prosecuted because they are not resident in the UK. It is very unlikely such a case would occur.

...

We have no evidence that the term ‘resident’ as opposed to ‘present’ represents any practical gap in the UK law.<sup>36</sup>

38. However, witnesses expressed concern that there are several groups of suspects who benefit from the impunity afforded them by the ‘residence’ requirement and who might specifically benefit from the ‘flexibility’ of the ‘residence’ requirement. The first category of suspects falling within the ‘practical gap’ is clear – the short term visitors, such as those in transit through or on holiday in the UK. In oral evidence, Mr Donovan named Felicien Kabuga – an alleged financier of the Rwandan genocide – as one suspect who is known to have travelled through the UK.<sup>37</sup> Additional suspects who have visited the UK are detailed in Aegis’ recent report.<sup>38</sup> Several of those identified by Aegis would not be liable to prosecution because they are not UK residents.

39. The second category are those suspects who are in the UK for longer periods.<sup>39</sup> Sir Ken Macdonald told us:

[T]he residency requirement...has meant, and I think is likely to mean, that people who have been in this country for some time, present in this country for some time, could escape prosecution because they could be held not to be residents. For example, someone here to undergo or to enjoy a substantial period of medical treatment.<sup>40</sup>

40. Mr Donovan informed the Committee that there are immigration files of people in the UK who are believed to have committed war crimes and crimes against humanity but, “for good human rights reasons, they cannot be removed back to their country. Those include Afghan warlords, Somali warlords, a driver for an assassination squad in Sri Lanka – these types of cases.”<sup>41</sup> While the Government said asylum seekers awaiting decisions ‘might’ be considered resident, they did not comment on those who have had their asylum claims

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<sup>35</sup> Ministry of Justice, annex 2, Ev 44.

<sup>36</sup> Ev 38-39.

<sup>37</sup> Q26.

<sup>38</sup> Aegis Trust report.

<sup>39</sup> Mr Donovan, Q26.

<sup>40</sup> Q20.

<sup>41</sup> Q26.



rejected because they are suspected to have committed international crimes (and are therefore not to be treated as refugees under the Refugee Convention). The Government has said ‘short-term students’ would not be considered ‘resident’, but has provided no definition of ‘short-term’.<sup>42</sup>

**41. What the Government has termed ‘flexibility’ in terms of who counts as a resident of the UK, would be more accurately regarded as a combination of legal loopholes and uncertainty. In our view, the residence requirement in the ICC Act 2001 creates practical impunity gaps in UK law.**

### *Rectifying the ‘residence’ impunity gap*

42. The evidence we received was overwhelmingly in favour of closing the impunity gap based on ‘residence’. Mr Machover said: “distinguishing on some arbitrary basis of residence or presence seems wrong. If they are present here in the UK they should be prosecuted...”<sup>43</sup> Human Rights Watch believes the existing ‘residence’ requirement “weakens the UK’s ability to pursue justice.”<sup>44</sup>

43. Several of those giving evidence argued that it would be simple to rectify the gap in the law created by the ‘residence’ requirement by using the language of the US Genocide Accountability Act 2007.<sup>45</sup> That US Act allows prosecution if “after the conduct required for the offence occurs, the alleged offender is brought into or found in the United States.”<sup>46</sup> The same presence requirement is proposed in the US Crimes Against Humanity Act 2009 which was introduced in the Senate on 24 June 2009.

44. The former Director of Public Prosecutions, Sir Ken Macdonald QC, told the committee that this change in UK law would make a practical difference:

I think that the likelihood of prosecutions, if the law were to be amended, is high. I think that there would be prosecutions.<sup>47</sup>

45. The Government has defended the ‘residence’ requirement, saying it believes it “offers the right balance” and that it does not result in ‘safe-haven’ for suspects “since [a suspect] cannot remain any length of time in the UK and cannot become resident here without risking prosecution.”<sup>48</sup> In oral evidence, the Minister reiterated this defence: “people who are coming to the UK who are transitory in one form or another, are not simply seeking a safe haven.”<sup>49</sup>

46. The Minister justified the difference between the presence requirement of torture and the more restrictive residence requirement for genocide on the grounds that “the international community has allowed for that level of jurisdiction around torture but not in

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<sup>42</sup> Ministry of Justice, Annex 2, Ev 43.

<sup>43</sup> Q24.

<sup>44</sup> Letter from Human Rights Watch to Jack Straw, Ev 25.

<sup>45</sup> Q27; Q20; see also Letter from Human Rights Watch to Jack Straw, Ev 25.

<sup>46</sup> Section 2(d)(5), S:888, U.S. Genocide Accountability Act of 2007.

<sup>47</sup> Q27.

<sup>48</sup> Ev 39.

<sup>49</sup> Q87.

respect of genocide.”<sup>50</sup> This is incorrect - other witnesses were clear that the discussion is not about establishing universal jurisdiction: they do not advocate assumption of universal jurisdiction for genocide, crimes against humanity and war crimes in civil wars, although even that level of jurisdiction is not prohibited in international law. A presence requirement would simply represent broader extra-territorial jurisdiction, not universal jurisdiction.<sup>51</sup> Universal jurisdiction would allow prosecution of anyone, anywhere in the world, for crimes committed anywhere in the world. This is not proposed for the UK.<sup>52</sup>

47. The Minister also said that the residence requirement “is what Parliament decided in 2001.”<sup>53</sup> In the debates regarding the ICC Act 2001 the primary issue being considered was whether the UK should have extra-territorial jurisdiction over the relevant crimes. Initially, the Bill had a citizenship requirement; this was amended to a residence requirement after the restrictiveness of the original proposal was raised in the House of Lords.<sup>54</sup>

48. Since the Minister gave oral evidence, the Government has announced it will retain the residence requirement under the ICC Act 2001 but is “exploring the possibility of providing more certainty as to who may (or may not) be considered to be a UK resident.”<sup>55</sup> The Government said the reason for retaining the residence test is that: “Our aim is not to become a policeman for the world.”<sup>56</sup>

49. There was significant discussion on this issue in the House of Lords second reading debate on the Coroners and Justice Bill on the day of the Government’s announcement. The overwhelming sentiment was commendation for the Government’s recognition of the need for reform but also significant concern that the term ‘resident’ should be broad enough to capture all visitors. For example, Lord Carlile said:

We would not be closing the loophole effectively if they were allowed to go shopping in Knightsbridge for a couple of days but were not liable to be arrested and tried here. It would continue the poor reputation that the United Kingdom has had as safe haven were there to be loopholes of that kind.

Therefore, I simply urge the Minister in a spirit of co-operation that, when the matter comes back, a test should be found which perhaps excludes those whose plane perforce, by act of God or some other temporary reason, puts down at Heathrow Airport to be refuelled or repaired, but includes those who have chosen to remain here for a period of time.<sup>57</sup>

50. In responding to the Government’s announcement, the Aegis Trust have said the retention of the residence test could potentially allow some legal loopholes to remain. Aegis

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<sup>50</sup> Q83.

<sup>51</sup> For example, see Q2-Q5.

<sup>52</sup> In its memorandum, Aegis specifically states that they do not recommend that the UK should become a ‘global prosecutor’, Ev 23.

<sup>53</sup> Q85.

<sup>54</sup> For example, The Lord Bishop of St Albans, 15 Jan 2001 col 966; Lord Goldsmith, 12 Feb 2001 col 78.

<sup>55</sup> 7 July 2009, Ministry of Justice Written Ministerial Statement, Coroners and Justice Bill.

<sup>56</sup> HL debate, 7 July 2009, column 658.

<sup>57</sup> House of Lords 7 July 2009 Col 655. Similar concern was expressed in the same debate by Baroness D’Souza, Lord Falconer of Thoroton, Lord Hannay of Chiswick, Lord Elystan-Morgan, and Lord Kingsland.

argued that the Government's "unstated reasons" for retaining the residence test are: "firstly, fear of offending key allies if their personnel are investigated when visiting the UK; and, secondly, worries about the cost of monitoring large numbers of people travelling through British airports." Aegis continued: "The answer is to trust the Police, Crown Prosecution Service and Attorney-General to use their discretion wisely, and to draw up criteria for the prioritisation of cases."<sup>58</sup> Aegis noted Canada's experience of a presence test, backdated to 1945 for crimes against humanity, as an example of how "robust laws can coexist with limited budgets and foreign policy concerns."<sup>59</sup>

**51. We welcome the Government's recognition that the existing law should be reviewed. Revisiting the definition of 'resident' at least has the potential to address the uncertainty in the current law. We recommend that 'residence' be replaced with a broadly defined 'presence' test so as to send the strongest possible message to international criminals that they are not welcome in the UK, whether to live here, shop, study, or visit. We recommend that the Government consider adopting the presence requirement in the US Genocide Accountability Act of 2007.**

### **Retrospection**

52. The second 'impunity gap' relates to the dates of the alleged crimes. Genocide, crimes against humanity and war crimes in civil wars were the last of the international crimes to be given extra-territorial jurisdiction in UK law, and they were not made retrospective, leaving significant differences in the dates from when those crimes can be prosecuted, and the dates when torture, hostage-taking and war crimes in international armed conflicts can be prosecuted (2001 compared with 1988, 1982 and 1957).

53. This impunity gap has been highlighted recently by the case of four Rwandan men alleged to have participated in genocide, who are now living in the UK. Rwanda has requested their extradition to face trial, based on case files of evidence. The UK courts found there was sufficient evidence to extradite the men to face trial, but the High Court subsequently refused extradition on human rights grounds – the Court found that their was a real risk the suspects would not receive a fair trial in Rwanda. To extradite them would therefore breach the suspects' rights under article 6 of the ECHR.<sup>60</sup> The International Criminal Tribunal for Rwanda has refused to transfer prisoners to Rwanda for trial for the same reason, as have other domestic jurisdictions in Europe.<sup>61</sup> It was reported on 9 July that Sweden will extradite a suspect to Rwanda to face trial.<sup>62</sup>

54. The Crown Prosecution Service (CPS) has determined that the crimes fall into the category of genocide and therefore there is no jurisdiction to prosecute the four suspects in the UK because the crimes were committed abroad, before 2001.<sup>63</sup> Had the crimes also

<sup>58</sup> Ev 24.

<sup>59</sup> Ibid.

<sup>60</sup> [2009] EWHC 770 (Admin).

<sup>61</sup> For example, the courts in Finland refused to extradite Rwandan suspects: <http://www.alertnet.org/thenews/newsdesk/LK126419.htm>. Regarding the International Criminal Tribunal for Rwanda's refusal to extradite: <http://www.afrol.com/articles/32140> <http://www.ictrcaselaw.org/docs/20081008-dco-9736A-01-en.pdf>

<sup>62</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/09/AR2009070902615.html>

<sup>63</sup> The Challenges of Extradition for International Crimes: the UK, Crown advocate of the Crown Prosecution Service, paper presented 27 November 2008, ICTR Forum, cited by Aegis, Ev 15.

fitted the definition of torture, they could have been prosecuted here under the Criminal Justice Act 1988. The men themselves are reported to have said they want a trial in the UK to clear their name.<sup>64</sup> The lack of jurisdiction is therefore problematic from the perspective of both victims and suspects.

55. We inquired into the remaining options for prosecuting the Rwandan suspects. In oral evidence, the Minister and her officials emphasised that the Government is “heavily involved in trying to build capacity in Rwanda” and is doing what it can “to try and ensure that [the Rwandan system of justice] is up to the full standards we talked about.”<sup>65</sup> The Minister reiterated that the country where the alleged crimes occurred should be the “first port of call” for a prosecution and noted that Rwanda could request extradition again at a later date if its criminal justice system were reformed.<sup>66</sup>

56. Our other witnesses agreed with the Government that, ideally, prosecution should take place in the country where the crimes occurred, “both for reasons of telling the truth about what happened to the crime and access to justice for the victims.”<sup>67</sup> However, they also noted that sometimes this is not possible, as in this case. Mr Donovan explained that the next option would be to find another court to prosecute, such as the ICC, but noted the ICC’s limitations:

Lots of countries have not signed up, and it is prospective. It looks forward from 2001. So any crimes that might be committed in countries that are not signatories to the Rome Statute or crimes which were allegedly committed before 2001 would not necessarily be covered.<sup>68</sup>

57. Mr Donovan continued: “Then of course you have the problem of just skipping over the border, perhaps to the UK.”<sup>69</sup> Sir Ken Macdonald explained the problem where suspects have made it to the UK:

The problem with extradition in these cases, of course, is that often these offences take place in parts of the world where there are no developed justice systems or where malpractice on the part of law enforcement authorities is endemic. It is always likely therefore that the High Court will refuse to sanction the extradition of people like these, which creates a serious problem for us.<sup>70</sup>

This is exactly what has happened in the case of the four Rwandans. This case “really shows the gap in the law in a very stark way.”<sup>71</sup> In such cases, noted Mr Donovan, “you rely on extra-territorial jurisdiction to fill in some of those gaps.”<sup>72</sup>

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<sup>64</sup> <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/5133779/Man-accused-of-taking-part-in-Rwandan-genocide-wants-to-face-trial-in-UK.html>

<sup>65</sup> Q63 and Q65.

<sup>66</sup> Q62; Q65.

<sup>67</sup> Mr Donovan, Q5.

<sup>68</sup> Q5.

<sup>69</sup> Q5.

<sup>70</sup> Q8.

<sup>71</sup> Mr Donovan, Q6.

<sup>72</sup> Q6.

58. Specifically, we were told that the options regarding the four Rwandan cases were now limited. They could not be sent to the special Tribunal (International Criminal Tribunal for Rwanda (ICTR)) because it has been wound up due to a lack of resources; the ICC in the Hague only has jurisdiction from 2002 onwards. The UN Security Council “having wound up the [ICTR], could refer cases back to the ICC, but that would take a Security Council resolution.”<sup>73</sup> Alternatively, Spain could seek extradition under its universal jurisdiction. Sir Ken Macdonald felt that “we probably should not be relying on the Spanish to sort out our problems for us in this area.”<sup>74</sup>

### *Remedying the impunity gap regarding retrospection*

59. We received evidence explaining the ways in which alternative dates for retrospection could be applied to the different crimes.<sup>75</sup> In oral evidence, Mr Donovan said Aegis preferred the approach taken in the Hetherington-Chalmers report on Nazi war crimes – the date of retrospective application should be the date from when a “crime is a crime in international customary law.”<sup>76</sup> This would mean retrospective application as follows:

- 1948 for genocide, being the date of the Genocide Convention.
- 1991 for crimes against humanity, being the date that the Statute of the International Criminal Tribunal for the former Yugoslavia was adopted, recognising that crimes against humanity are “beyond doubt part of customary law.”
- 1949 for *all* war crimes contained in the Geneva Conventions of 1949 (and other dates for specific war crimes as they became international crimes, for example, 1907 for certain of the Hague Conventions, 1977 for the additional protocols, 1998 for those crimes considered to have been first recognised in the Rome Statute.)

60. Until the recent announcement, the Government had resisted all proposals to broaden the UK’s jurisdiction over the crimes under the ICC Act 2001 by making it retrospective. The justification for the difference between crimes under the ICC Act 2001 and the crimes of torture, hostage-taking and war crimes in international armed conflicts centred on what the UK is *obliged* to do under international law:

We only [exercise universal jurisdiction] when required to by an international convention or agreement, where the international community as a whole has agreed that the crimes are such as to warrant, and even require, universal jurisdiction...there is no such agreement covering war crimes, genocide or crimes against humanity.<sup>77</sup>

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<sup>73</sup> Q34-Q37.

<sup>74</sup> Q10.

<sup>75</sup> Aegis Trust report, NGO joint paper, John RWD Jones, Ev 26. Aegis originally proposed what Mr Donovan described in oral evidence as a “conservative” selection of dates, using dates when domestic law in the UK first criminalised genocide and war crimes, but taking the date when international law first officially recognised crimes against humanity, Q14.

<sup>76</sup> Q14.

<sup>77</sup> Ev 39.

61. In his submission to the Committee, John R.W.D. Jones, barrister, argued that the ICC Act 2001 “gives the narrowest, most conservative construction of the UK’s obligations under the Rome Statute, confining the UK’s jurisdiction...”<sup>78</sup> In written evidence, Sir Ken Macdonald QC said that although the UK has not technically failed to implement an international treaty in this regard, there are strong arguments in favour of wider UK jurisdiction over crimes under the ICC Act 2001 on the basis of customary international law.<sup>79</sup> In oral evidence, Mr Donovan, Mr Machover and Sir Ken Macdonald QC all argued not for full universal jurisdiction, but for wider extra-territorial jurisdiction for genocide, crimes against humanity and war crimes in internal armed conflicts.<sup>80</sup> The point made by the witnesses was that the Government is *permitted* to establish broader jurisdiction in implementing the relevant international law. It is not necessarily restricted by what is mandated.<sup>81</sup>

62. Sir Ken Macdonald QC argued that the principle of ‘no crime or punishment without existing law’ – on which the presumption against retroactive criminal law is based – was not to be used as a technicality to prevent clearly criminal behaviour being prosecuted:

It is worth reminding ourselves of what Article 7.2 of the European Convention on Human Rights said. It provides the prohibition against retroactive law, “...shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.”<sup>82</sup>

63. In its written memorandum, the Government resolutely defended the non-retrospectivity of the ICC Act 2001. In October 2008, the Government said:

Retrospection was firmly ruled out at the time Parliament debated [the ICC Act 2001] because it was held that retrospection would not provide sufficient certainty about what would constitute an offence and at what period of time.<sup>83</sup>

64. In February 2009, the Government reiterated concerns about different dates for different crimes, arguing that they might confuse prosecutors, and that :

<sup>78</sup> Ev 26.

<sup>79</sup> Ev 79.

<sup>80</sup> Q2-5.

<sup>81</sup> Q11, Q14, Q15.

<sup>82</sup> Q15. The NGO joint paper also quoted Article 7.2 ECHR and noted that Article 15(2) of the International Covenant on Civil and Political Rights states the same proviso regarding the principle of non-retrospectivity, Ev 1. Aegis reiterate this same point in their June 2009 report, Ev 15. Aegis highlight the case of *S.W. v the United Kingdom* (Case no. 48/1994/495/577) in which a husband had been charged with raping his wife in 1990. The Court did not support the husband’s argument that the common law principle of criminal immunity for rape in marriage still applied on the relevant date (the Law Lords having declared in 1991 that the principle that a husband cannot rape his wife no longer applied to the law of England and Wales (*R. v R.* [1991] 4 All England Law Reports 481)). The Court held that the essentially debasing character of rape is so manifest that the husband was convicted (para 44). Aegis also quote Justice Jackson, the chief prosecutor at Nuremberg Tribunal on the ‘novelty’ of the concept of crimes against humanity (in his Opening Statement):

It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them by surprise...The fourth Count of the Indictment is based on Crimes against Humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?

<sup>83</sup> Ministry of Justice, annex 2, Ev 43.



[Adopting the proposed dates for retrospective application] may still mean that some crimes committed during some conflicts will not be covered, and there will be inconsistencies which will be difficult to justify.<sup>84</sup>

Sir Ken Macdonald told the Committee different dates of jurisdiction would pose no problem to prosecutors.<sup>85</sup>

65. The Minister re-stated in oral evidence that Parliament decided against retrospection in 2001.<sup>86</sup> We asked the Minister and her officials to provide us with Hansard references for the debate which the Government has referred to as a reason why the ICC Act 2001 should not be made retrospective. None of the references provided are of a substantive debate on the issue of retrospection.<sup>87</sup> **We can see no evidence that Parliament substantively debated retrospective criminalisation of genocide, crimes against humanity and war crimes in internal armed conflicts in the 2001 debate, as the Government has asserted.**

66. On 7 July 2009, the Government announced that the ICC Act 2001 would be given retrospective effect from 1 January 1991, through amendments to the Coroners and Justice Bill at Report stage in the House of Lords in the autumn.<sup>88</sup> According to the Ministerial Statement, all three offences will have the same date of retrospective application – 1 January 1991. This is the date from when the last of the three crimes was recognised in international law (crimes against humanity). The retrospective application will enable prosecution of offences committed in Rwanda in 1994. It will cover much of the Sri Lankan conflict and a number of others. It will not, however, cover the Cambodian genocide.

67. **We welcome the Government’s announcement to apply retrospection to the crimes of genocide, crimes against humanity and war crimes in internal armed conflicts. In agreeing to make the ICC Act 2001 retrospective, the Government has accepted that the international community does not need to have *mandated* that states establish extra-territorial jurisdiction for the UK to implement it. However, we fail to understand the justification for using 1991 as the date from when extra-territorial jurisdiction should apply to genocide and war crimes; it is a date only relevant to crimes against humanity. In principle, the aim should be to establish jurisdiction as far back as is legally possible for each offence. It is not necessary that the dates for each offence be the same – it is justifiable for the dates to be different on the grounds that some offences date back further than others in international law. We recommend that the Government use the dates when the relevant crimes were internationally recognised, and establish retrospection accordingly. We recommend the law be amended to provide extra-territorial jurisdiction over genocide from 1948 and war crimes in internal armed conflicts from 1949. We recognise that there may be complexity in defining the relevant dates for types of war crimes but this should not be overstated. We do not consider this to be an exercise beyond the capacity of the UK Government, or beyond the understanding of the public.**

<sup>84</sup> Ev 37. In oral evidence, the Minister reiterated this argument saying that there would be a “perception issue”, a “difficulty in the presentation of that, to have retrospectivity that is not common throughout” the crimes: Q66, Q67, Q69.

<sup>85</sup> Q16.

<sup>86</sup> Q59.

<sup>87</sup> References provided were: Lords 15 Jan 2001 col 958; Lords 12 Feb 2001 col 50, 54, 70, 72 and 82. See Ev 55.

<sup>88</sup> Written Ministerial Statement, Ministry of Justice, Coroners and Justice Bill.

## Costs and practical considerations

68. The Government told the Committee that war crimes cases can be “very protracted and resource intensive.”<sup>89</sup> The memorandum also said that any increase in police workload will mean that “resources are spread more thinly and that other cases will need to be given correspondingly less priority and resources...there is little likelihood that any additional resources will be readily available and reallocation of existing resources would need to be robustly justified.”<sup>90</sup>

69. In an open letter to the Government, Redress and African Rights suggested that the issue of resources was the primary reason for the Government’s reluctance to amend the law. They quote with favour Lord Carlile: “These are, after all, cases of mass murders in some cases, of war crimes in other cases, and therefore the resourcing [of a specialised unit] is very well justified on the merits.”<sup>91</sup>

70. In written evidence, Aegis told the Committee that a special unit within the Metropolitan Police and CPS would be needed to investigate and prosecute these crimes, noting that a specialist unit was established following the War Crimes Act 1991 but was disbanded in the late 1990s.<sup>92</sup> Sir Ken Macdonald QC also noted the need for a specialist unit and suggested that the UK could learn from experience in Canada, the Netherlands and the Scandinavian countries, where specialist units operate.<sup>93</sup>

71. The Government highlighted practical problems with prosecuting genocide and related offences, such as collecting evidence overseas, finding and identifying witnesses from war zones who were willing to testify, and language barriers.<sup>94</sup> In oral evidence, Mr Donovan said of the practical difficulties:

Yes, I believe there are considerable difficulties. Not insuperable. It has been done before in the UK and it has been done before in other countries. The Dutch team have just prosecuted a Rwandan for genocide. There is a case that is ongoing at the moment in Canada of a Rwandan who allegedly committed genocide. Here in the UK...there was the case of Zardad...<sup>95</sup>

72. Sir Ken Macdonald QC said:

Lots of categories of offence are difficult, time-consuming and complex to prosecute. Terrorism cases come into that category; money-laundering cases come into that category. This is a question of prioritising and devoting resources, if that is the desire

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<sup>89</sup> Ev 20.

<sup>90</sup> Ibid.

<sup>91</sup> 8 May 2009, Redress and African Rights, Open Letter to UK Government on Rwanda Genocide.

<sup>92</sup> Ev 20.

<sup>93</sup> Ev 35; Q33. Aegis note that in Sweden, their special unit of 10 investigators, with 30-40 investigations, costs US\$2.6 million a year (2008/9). In all countries with specialised units (Belgium, Denmark, Sweden, Norway, the Netherlands and Canada), there has been the combined total of 12 convictions from 7 finalised cases, Ev 23.

<sup>94</sup> Ev 38.

<sup>95</sup> Q31.



of Parliament and if that will of Parliament is taken seriously by the prosecuting authorities.<sup>96</sup>

**73. The Tamils Against Genocide said in their memorandum: “Whilst [there could be] little by way of prosecution owing to evidential difficulties, this is a lesser problem than an absence of prosecution owing to the legal incapacity to instigate it.”<sup>97</sup> We agree.**

74. After being questioned in oral evidence, the Minister seemed to acknowledge this point:

[Practical difficulties with prosecutions do] not suggest that you should not have the law right in the first place, but it does suggest that you also need to bear in mind the practical realities and not simply putting onto statute legislation that, in reality, nobody can do anything about...we need to consider what the overall package is.<sup>98</sup>

**75. We take the Government’s point that prosecutions for international crimes are likely to be expensive, complex and time-consuming. However, as the Government have now acknowledged, this is a secondary concern - it is far worse to be incapable of prosecution where the evidence would otherwise support it. Practical difficulties and potential costs cannot stand as a reason for the UK not having jurisdiction to prosecute the rare cases that do satisfy the evidentiary requirements.**

**76. We recommend that the Government re-establish a specialist war crimes unit and that they give it resources commensurate with the seriousness of the crimes they need to investigate and the importance of leading the world in bringing international criminals to justice.**

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<sup>96</sup> Q31.

<sup>97</sup> Ev 52.

<sup>98</sup> Q72.

## 3 Reparations for torture victims

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### The existing law

77. Many international human rights treaties enshrine the right to a remedy and reparations, including the Universal Declaration of Human Rights (1948),<sup>99</sup> the International Covenant on Civil and Political Rights (1966),<sup>100</sup> UNCAT,<sup>101</sup> and the Rome Statute for an International Criminal Court (1998).<sup>102</sup> Article 14 of UNCAT says:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.

78. There is debate as to whether Article 14 of UNCAT requires states to provide universal *civil* jurisdiction – the UK Government argues it does not.<sup>103</sup> In their joint paper of July 2008, Amnesty International, Redress, Hickman and Rose and FIDH argue that it does.<sup>104</sup>

79. The UK has established universal criminal jurisdiction over acts of torture committed abroad after 1988, but there is no such provision for universal civil jurisdiction. The State Immunity Act 1978 gives states immunity from the jurisdiction of the UK courts, with only specific exceptions. The exceptions are listed in the Act and include, among others, proceedings relating to:

- commercial transactions and contracts entered into by the foreign state<sup>105</sup>
- employment contracts with UK residents<sup>106</sup>
- interests in moveable or immoveable property<sup>107</sup>
- patents and trade-marks<sup>108</sup>

80. The House of Lords in *Jones v Saudi Arabia* held that the State Immunity Act 1978 prevents the court from hearing a civil claim for torture against a foreign state.<sup>109</sup> The Lords took the view that Article 14 only requires a state to provide a private right of action for damages for acts of torture committed in the forum state, so the UK is only required to provide a civil remedy for torture committed in the UK.<sup>110</sup>

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<sup>99</sup> Article 8.

<sup>100</sup> Articles 2(3), 9(5) and 14(6).

<sup>101</sup> Article 14.

<sup>102</sup> Article 75.

<sup>103</sup> Ev 37.

<sup>104</sup> NGO joint paper.

<sup>105</sup> Section 3, State Immunity Act 1978

<sup>106</sup> Section 4, State Immunity Act 1978

<sup>107</sup> Section 6, State Immunity Act 1978

<sup>108</sup> Section 7, State Immunity Act 1978

<sup>109</sup> *Jones v Interior Ministry of Saudi Arabia* [2006] UKHL 26, at para 28.

<sup>110</sup> At para 25.

### **Other jurisdictions**

81. We did not take detailed evidence on the mechanics of other jurisdictions, however we received some broad evidence in this regard. Amnesty International said, in their submission regarding the 2008 Torture (Damages) Bill, that at least 25 countries in both common and civil law jurisdictions guarantee the right of victims and their families to recover reparations for crimes committed abroad by individuals who are not nationals of those forum countries.<sup>111</sup> In addition, Amnesty said it is “common for civil law countries which authorise their courts to exercise universal criminal jurisdiction to permit victims and their families, regardless of their nationality, to recover, in the course of criminal proceedings, civil reparations for crimes committed aboard by non-nationals.”<sup>112</sup> In their joint paper, Amnesty, Redress, Hickman and Rose and FIDH note that “extra-territorial civil claims for torture are more made in civil law countries by attaching civil claims to ongoing criminal proceedings.”<sup>113</sup> Kevin Laue, Legal Advisor to Redress said “there is no state immunity type bar on the continent in civil law jurisdictions.”<sup>114</sup> However, Mr Laue did not believe it would be possible to link reparations with criminal law in the UK because that would represent “such a radical change” to the strict division between criminal and civil law in the UK legal system.<sup>115</sup>

82. The memorandum from Justice and the joint paper from Amnesty, Redress, Hickman and Rose and FIDH both referred to the US as the only common law country which allows victims to sue foreign officials for torture.<sup>116</sup> The 1992 US Torture Victim Protection Act provides that any person, US citizen or not, may bring a claim against a foreign official (an individual acting under the actual or apparent authority of a foreign state) for torture in the US federal courts, irrespective of where the alleged offences occurred. The US law is not straight forward and the Minister and her officials disagreed that it was as broad as other evidence had suggested to the Committee.<sup>117</sup> Mr Laue said the “US position is considerably different to the UK position,” noting that although foreign individuals can be sued for torture in the US, the US Foreign Sovereigns Immunity Act “does actually bring to bear this principle of state immunity, certainly for heads of states.” He continued: “The only real exception is that arising from ...the Anti-Terrorism and Effective Death Penalty Act...if you are an alien or a US citizen and you have been a victim of torture by one of those listed states then you can actually sue that state and the normal immunity which a state has falls away.”<sup>118</sup>

### **What does the current law mean in practice?**

83. The state of UK domestic law means that UK citizens and residents who suffer torture abroad cannot sue the foreign governments responsible. The only avenue for reparations

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<sup>111</sup> Included as an annex to Redress’s memorandum, Ev 44. Amnesty also said this number was preliminary and they expected it to actually be higher.

<sup>112</sup> Ibid.

<sup>113</sup> Justice, briefing on the Torture (Damages) Bill; NGO joint paper.

<sup>114</sup> Q46.

<sup>115</sup> Q47 and Q48.

<sup>116</sup> Justice, briefing on the Torture (Damages) Bill; NGO joint paper.

<sup>117</sup> Q122

<sup>118</sup> Q44.

open to torture victims is diplomatic negotiations. Redress states: “In reality, [diplomatic protection] cannot be regarded as an adequate, effective, available or predictable alternative.”<sup>119</sup> The Court of Appeal in *Abbassi v Secretary of State for Foreign and Commonwealth Affairs* said: “Where certain criteria are satisfied, the government will ‘consider’ making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State.”<sup>120</sup> Amnesty International has noted that the state “will often sacrifice the legal rights of the victim to competing political considerations, such as maintaining friendly relations with the state responsible for the wrong.”<sup>121</sup> Currently, therefore, victims rarely secure reparations.

84. The state immunity rule effectively provides impunity for torturers and torturing states.<sup>122</sup> Seeing perpetrators suffer no consequences reinforces the distrust of society which the torture engenders in the first place. Both the impunity for perpetrators and the absence of access to reparations represent a major injustice for the victims of torture and “can have a detrimental effect on their psychological wellbeing and recovery.”<sup>123</sup> Access to reparations is “a vital part of the healing process and of the re-empowerment of torture survivors.”<sup>124</sup>

## The Torture (Damages) Bill – law reform to provide access to reparations

85. The Torture (Damages) Bill (“the Bill”) provides an additional exception to state immunity – a state would no longer be immune in respect of civil proceedings in UK courts for torture.<sup>125</sup>

86. The Bill was passed by the House of Lords in 2007-08 but failed to make progress in the House of Commons. In January 2009, the Bill was again introduced in the House of Lords by Lord Archer of Sandwell, and it has also been introduced in the House of Commons by our Chair, Andrew Dismore MP (Torture (Damages) (No. 2) Bill 2008/09). At the time of publication, the Torture (Damages) (No. 2) Bill was scheduled for second reading in the Commons on 16 October 2009. No date is scheduled for second reading of the parallel Bill in the Lords; it had its first reading on 14 January 2009.

87. The Government has opposed the establishment of civil jurisdiction over torture, saying, firstly, that the UK is not *required* to establish civil jurisdiction:

When the United Nations Convention Against Torture was negotiated the option of creating an international civil cause of action was...not pursued.<sup>126</sup>

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<sup>119</sup> Redress submission in support of Torture (Damages) Bill 2008 para 24, available at: [www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf](http://www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf).

<sup>120</sup> *R (on the application of Abbassi and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598, para 99.

<sup>121</sup> Amnesty International, ‘Letter to the Foreign and Commonwealth Office on the UN Convention on the Jurisdictional Immunities of States and their Properties’ (5 May 2005)

<sup>122</sup> Q42

<sup>123</sup> Ev 44.

<sup>124</sup> Annex to Redress, May 2008, submission to Lord Archer of Sandwell in Support of the Torture (Damages Bill). Available at: [www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf](http://www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf)

<sup>125</sup> Clause 3 and clause 1(5).

88. The Government also says the UK is not *allowed* to establish such jurisdiction: assuming civil jurisdiction as provided for in the Bill “would place the UK in breach of our obligations under international law.”<sup>127</sup> The Government specifically argues that the UK would be in breach of the 2004 Convention on Jurisdictional Immunities of State and Their Property, which the UK signed in 2005, adding that that Convention “makes no exception in respect of civil actions in respect of personal injury or death that is alleged to have occurred outside the territory of a state.”<sup>128</sup>

89. Redress argue in both written and oral evidence that “at the very least”, the UK is *permitted* under international law to give jurisdiction to its courts for a victim to sue a state for torture.<sup>129</sup> In supplementary written evidence (reiterating their original memorandum) Redress specifically addressed the argument that the Convention on Jurisdictional Immunities prevents the UK from amending its domestic legislation to exempt torture from the State Immunity Act 1978:

[This argument] is not sustainable, and needs to be viewed in a proper context: firstly, the recent Jurisdictional Convention is not yet in force as it requires 30 ratifications and to date there are only 6 parties to it, and 28 signatories; secondly, this can and should be compared to the 1984 UN Torture Convention (and all the obligations under it) which has been in force for more than 20 years and currently has 146 parties – indeed, the Torture Convention is one of the most widely ratified of all international treaties; thirdly, international law evolves with time and the Jurisdictional Convention, even if/when it comes into force, cannot and will not entrench or crystallise international law on state immunity for the future – it therefore doesn’t prevent states from expanding the restrictive approach to state immunity in which the UK has always been a leader.<sup>130</sup>

90. The then Shadow Lord Chancellor, the late Lord Kingsland, in the 2008 second reading debate of the Bill in the House of Lords, said:

Once the state immunity inhibition is removed – if the Bill is passed – it is not...the end of the story, because there is still the international law on state immunity, which might continue to inhibit a private action in our own courts from succeeding. It would be wrong...to think that the mere passage of the Bill will necessarily achieve the objectives...If the Bill is passed by Parliament, it will be the beginning of the journey, not the termination of it.<sup>131</sup>

91. In oral evidence, Mr Laue agreed that, in a case in the UK courts, a defendant state could try to argue that regardless of the domestic law of the UK, international law entitles the defendant state to immunity. However, Mr Laue said that if this argument was raised in a case, it would be a matter for the court to determine the position in international law.<sup>132</sup>

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<sup>126</sup> Ev 40.

<sup>127</sup> Ev Ibid.

<sup>128</sup> Ev Ibid.

<sup>129</sup> Q42, Ev 44.

<sup>130</sup> Ev 50.

<sup>131</sup> 16 May 2008: Column 1224.

<sup>132</sup> Q43.

In their written memorandum, Redress acknowledges that, currently, international law provides that state immunity can be claimed in respect of violations of fundamental principles such as the absolute prohibition of torture.<sup>133</sup> However, Redress also notes the minority judgment (of 8-9) in the case of *Al-Adsani v UK* in the European Court of Human Rights, as illustrative of potential developments: “the minority were of the view that the “procedural bar of state immunity” is automatically lifted when it comes into conflict with the “hierarchically higher rule” of the absolute prohibition of torture.”<sup>134</sup>

92. Baroness Falkner of Margravine reminded the House of Lords, in the 2008 second reading debate, that “in the final assessment, international law is based on consensus about the degree of interference there can be by the international community, or other state parties and actors, with the sovereignty of states.”<sup>135</sup> In that same debate, Lord Woolf said:

It is perhaps unfortunate that the State Immunity Act was passed in 1978 but that the Convention on Torture, to which reference has been made, dates from 1984. I wonder whether, if the order had been reversed and the number of states that would ratify the Convention on Torture had been known, the absence of torture as an exception to the State Immunity Act would have been rectified.<sup>136</sup>

Redress and the other NGOs argue that basic principles of international law, UNCAT as a whole, and specifically Article 14, place a positive obligation on the Government “to be more forthcoming” in dealing with the bar to obtaining reparations, which is also a grant of impunity in many cases.<sup>137</sup> Mr Laue reiterated Lord Woolf’s comments quoted above and added:

International law develops – it is not static – and we would certainly hope – and we think there are strong arguments – that once this domestic bar is dealt with the courts would be open to an argument that international law has moved on.<sup>138</sup>

**93. The Torture (Damages) Bill will not automatically deliver reparations to victims. The scope of this Bill is narrow – to remedy the UK’s domestic legislation; it does not purport to be the panacea of all obstructions to justice for torture victims. It is the necessary first step.**

**94. Creating the exception to state immunity for the tort of torture would give the courts the opportunity to develop international law in this regard. We think that the pre-eminence of UNCAT, and in particular article 14, provides a strong basis for positive future developments. The Government’s interpretation of the current international legal position is not a sufficient reason to retain unjust, outdated domestic law and prevent any opportunity for the UK to lead the development of international law in this regard.**

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<sup>133</sup> Redress submission in support of Torture (Damages) Bill 2008 para 24, available at: [www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf](http://www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20A4%20saved.pdf).

<sup>134</sup> *Al-Adsani v United Kingdom* (35763/97) [2001] ECHR 752, Joint Dissenting Opinion of judges Rozakis et al, at para 3; Ev 44.

<sup>135</sup> 16 May 2008, column 1221

<sup>136</sup> 16 May 2008, column 1220

<sup>137</sup> Q42; Ev 9.

<sup>138</sup> Q43.



### **Practical concerns**

95. The Government has also objected to the Bill for ‘practical’ reasons – enforceability and foreign policy considerations. The Government has argued that a judgment against a foreign state would be unenforceable and that attempts to enforce by seizing the property or assets of a state “would be particularly controversial, and liable to lead to retaliatory action against United Kingdom interests.”<sup>139</sup>

96. On the issue of practicalities, the then Shadow Lord Chancellor, Lord Kingsland, in the 2008 second reading debate of the Bill in the House of Lords, said:

[T]here is of course a range of difficulties connected with the appearance of the defendant and how the defendant is represented, and a raft of evidential issues which will have to be confronted and overcome before the Bill can have, if it were to become law, operational effect. But that should be no deterrent and certainly is not a deterrent as a matter of principle.<sup>140</sup>

97. Redress acknowledge that actions against foreign states for torture could involve questions of foreign policy:

[Y]es, one has to acknowledge that that could upset another government...if foreign states argued that they were going to take some sort of retaliatory action then that would need to be dealt with. This happens. In the Pinochet case, for example...the Chilean Government said that this was going to lead to a diplomatic crisis of some kind. States do that. But we would say that the UK should be taking a lead on developing access to justice.<sup>141</sup>

98. In their written submission, Redress were clear that the UK should view the torturing state as the state threatening diplomatic relations, not the UK trying to provide access to justice for victims.<sup>142</sup> Mr Laue also pointed out that there are already existing foreign relations issues with judgments against states in commercial claims. These existing problems with enforcement – “you cannot simply seize another state’s assets, even where it is arising from a contract” – also demonstrate that enforcement concerns are not a bar to other actions existing in law.<sup>143</sup>

99. Mr Laue emphasised that the Bill does not seek to address potential and even probable difficulties with enforcement of a judgment – of an award for damages – against a foreign state for torture:

[W]e recognise that the question of enforcement is an issue but this Bill does not deal with that directly or even indirectly – it is simply allowing people to get to court and to bring a claim.<sup>144</sup>

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<sup>139</sup> Ev 40.

<sup>140</sup> 16 May 2008, column 1225.

<sup>141</sup> Q54.

<sup>142</sup> Ev 44.

<sup>143</sup> Q54.

<sup>144</sup> Q54.

However he also emphasised that Redress “are not saying that it is unenforceable; we are saying that there would be difficulties which would need to be dealt with.”<sup>145</sup> The same argument applies to evidential and procedural difficulties:

...it cannot be run away from. But the purpose of the Bill is much more modest; it is simply to remove this barrier which prevents any of these further issues ever becoming relevant. It is a first step. But we do not believe that things like the production of evidence by either side are insurmountable if a litigant is allowed into court. It could be difficult in some cases, but not impossible.<sup>146</sup>

100. Mr Laue further pointed out that, aside from the practical difficulties of procedure and enforcement, “there is value in being able to get it to court.”

For example, one can speculate, but possibly a state that is being sued would be embarrassed and would want to settle the case to actually avoid it being aired in public. If, however, it was completely obdurate then the mere fact that a torture survivor has had his or her day in court and has obtained vindication can in itself be a partial victory. It is by no means in that sense an all or nothing. There are cases outside of this issue where people get a judgment and maybe have problems in enforcing it if the defendant is a man of straw, and so on. But it does not mean that it is a waste of time.<sup>147</sup>

**101. The practical questions of foreign relations, enforcement and litigation procedure are important, but they are secondary to the issue we are examining, which is: should there be a civil remedy available in the UK to victims of torture at the hands of foreign states? We are of the strong opinion that there should. Such an action would be in line with our positive responsibilities towards torture victims under international law. It would also go a long way towards the rehabilitation of torture victims, for whom access to an action for damages would itself be an acknowledgement of their suffering.**

**102. The UK should lead the international community in condemning torture and expanding international law to ensure victims have access to the reparations they are entitled to. This Bill would send a strong message: there are consequences for states that torture. We recommend the Government adopt the Torture (Damages) Bill and then consider what else needs to be done to promote its enforcement.**

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<sup>145</sup> Q55.

<sup>146</sup> Q56.

<sup>147</sup> Q55.



## 4 Conclusions

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103. Much of the evidence we received in this inquiry referred to the importance of the UK becoming a leader in the fight against war criminals and torturers. No one is recommending that the UK should become a 'global prosecutor', but where there is evidence and the public interest demands it, the UK courts must have the legal capacity to play their part in bringing perpetrators to justice.

104. We are concerned that the existing 'impunity gaps' created by the ICC Act 2001 has left the UK out of step with international law and trailing other countries such as Switzerland, Belgium, Finland, the Netherlands and Norway, who have prosecuted suspects, or investigated suspects with a view to domestic prosecution, after their courts also refused to extradite to Rwanda.<sup>148</sup> Anyone in the UK suspected of the horrendous crimes now long-recognised in international law should be investigated and, where appropriate, prosecuted. The message must be clear: no international criminal is welcome here – not to shop, holiday, receive medical treatment, study, live, or visit. We commend the Government for responding to the sound arguments put before it and hope that the amendments to the Coroners and Criminal Justice Bill live up to the expectations of victims, the British public and the international community.

105. States and officials acting on behalf of states should not be entitled to immunity for acts of torture. There may be uncertainty today but it is only a matter of time before international law develops to ensure that torturers will be liable to pay their victims reparations. The UK should be leading this development. Foreign policy considerations should not prevent the UK condemning states that torture – there must be consequences for such actions. It is not the UK's insistence on maintaining human rights standards which damages foreign relations, it is the state which tortures our citizens. We are concerned at the Government's dogged defence of the state immunity rule for torture. We sincerely hope the Government reconsiders its position and accepts the strong arguments in favour of the Torture (Damages) Bill.

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<sup>148</sup> As discussed by Redress and African Rights, 8 May 2009, Open Letter to UK Government on Rwanda Genocide.

## Recommendations

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1. What the Government has termed ‘flexibility’ in terms of who counts as a resident of the UK, would be more accurately regarded as a combination of legal loopholes and uncertainty. In our view, the residence requirement in the ICC Act 2001 creates practical impunity gaps in UK law. (Paragraph 41)
2. We welcome the Government’s recognition that the existing law should be reviewed. Revisiting the definition of ‘resident’ at least has the potential to address the uncertainty in the current law. We recommend that ‘residence’ be replaced with a broadly defined ‘presence’ test so as to send the strongest possible message to international criminals that they are not welcome in the UK, whether to live here, shop, study, or visit. We recommend that the Government consider adopting the presence requirement in the US Genocide Accountability Act of 2007. (Paragraph 51)
3. We can see no evidence that Parliament substantively debated retrospective criminalisation of genocide, crimes against humanity and war crimes in internal armed conflicts in the 2001 debate, as the Government has asserted. (Paragraph 65)
4. We welcome the Government’s announcement to apply retrospection to the crimes of genocide, crimes against humanity and war crimes in internal armed conflicts. In agreeing to make the ICC Act 2001 retrospective, the Government has accepted that the international community does not need to have mandated that states establish extra-territorial jurisdiction for the UK to implement it. However, we fail to understand the justification for using 1991 as the date from when extra-territorial jurisdiction should apply to genocide and war crimes; it is a date only relevant to crimes against humanity. In principle, the aim should be to establish jurisdiction as far back as is legally possible for each offence. It is not necessary that the dates for each offence be the same – it is justifiable for the dates to be different on the grounds that some offences date back further than others in international law. We recommend that the Government use the dates when the relevant crimes were internationally recognised, and establish retrospection accordingly. We recommend the law be amended to provide extra-territorial jurisdiction over genocide from 1948 and war crimes in internal armed conflicts from 1949. We recognise that there may be complexity in defining the relevant dates for types of war crimes but this should not be overstated. We do not consider this to be an exercise beyond the capacity of the UK Government, or beyond the understanding of the public. (Paragraph 67)
5. The Tamils Against Genocide said in their memorandum: “Whilst [there could be] little by way of prosecution owing to evidential difficulties, this is a lesser problem than an absence of prosecution owing to the legal incapacity to instigate it.” We agree. (Paragraph 73)
6. We take the Government’s point that prosecutions for international crimes are likely to be expensive, complex and time-consuming. However, as the Government have now acknowledged, this is a secondary concern - it is far worse to be incapable of prosecution where the evidence would otherwise support it. Practical difficulties and

potential costs cannot stand as a reason for the UK not having jurisdiction to prosecute the rare cases that do satisfy the evidentiary requirements. (Paragraph 75)

7. We recommend that the Government re-establish a specialist war crimes unit and that they give it resources commensurate with the seriousness of the crimes they need to investigate and the importance of leading the world in bringing international criminals to justice. (Paragraph 76)
8. The Torture (Damages) Bill will not automatically deliver reparations to victims. The scope of this Bill is narrow – to remedy the UK’s domestic legislation; it does not purport to be the panacea of all obstructions to justice for torture victims. It is the necessary first step. (Paragraph 93)
9. Creating the exception to state immunity for the tort of torture would give the courts the opportunity to develop international law in this regard. We think that the pre-eminence of UNCAT, and in particular article 14, provides a strong basis for positive future developments. The Government’s interpretation of the current international legal position is not a sufficient reason to retain unjust, outdated domestic law and prevent any opportunity for the UK to lead the development of international law in this regard. (Paragraph 94)
10. The practical questions of foreign relations, enforcement and litigation procedure are important, but they are secondary to the issue we are examining, which is: should there be a civil remedy available in the UK to victims of torture at the hands of foreign states? We are of the strong opinion that there should. Such an action would be in line with our positive responsibilities towards torture victims under international law. It would also go a long way towards the rehabilitation of torture victims, for whom access to an action for damages would itself be an acknowledgement of their suffering. (Paragraph 101)
11. The UK should lead the international community in condemning torture and expanding international law to ensure victims have access to the reparations they are entitled to. This Bill would send a strong message: there are consequences for states that torture. We recommend the Government adopt the Torture (Damages) Bill and then consider what else needs to be done to promote its enforcement. (Paragraph 102)

# Formal Minutes

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**Tuesday 21 July 2009**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness Lord Dubs Lord Morris of Handsworth The Earl of Onslow Baroness Prashar	Dr Evan Harris MP Mr Virendra Sharma MP
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Draft Report (Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims), proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 105 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Twenty-fourth Report of the Committee to each House.

*Ordered*, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

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[Adjourned till Tuesday 13 October at 1.30pm.]

## Witnesses

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### Tuesday 19 May 2009

Page

**Sir Ken Macdonald QC, Mr Daniel Machover**, Solicitor, Hickman and Rose, and **Mr Nick Donovan**, Head of Campaigns, Policy and Research, Aegis Trust Ev 1

### Wednesday 1 July 2009

**Mr Kevin Laue**, Legal Advisor, REDRESS Ev 8

**Claire Ward MP**, Parliamentary Under Secretary of State, **Ms Deborah Grice**, Head of Criminal Law Policy and **Mr Gilad Segal**, Senior Lawyer, Criminal Law, Ministry of Justice Ev 11

## List of written evidence

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1	Aegis Trust	Ev 20; 23
2	Theodore Simburudari, President of Ibuka	Ev 25
3	Letter from Tom Porteus, London Director, Human Rights Watch, to Rt Hon Jack Straw MP, Secretary of State for Justice, dated 12 May 2009	Ev 25
4	John RWD Jones, Doughty Street Chambers	Ev 26
5	Liberty	Ev 30
6	Ken Macdonald QC	Ev 33
7	Medical Foundation for the Care of Victims of Torture	Ev 35
8	Ministry of Justice	Ev 37
9	REDRESS	Ev 44; 50
10	Tamils Against Genocide	Ev 50
11	Letter from Claire Ward MP, Parliamentary Under Secretary of State, Ministry of Justice, dated 20 July	Ev 55

## List of Reports from the Committee during the current Parliament

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First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398
Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill	HL Paper 78/HC 414
Fifteenth Report	Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)	HL Paper 81/HC 441
Sixteenth Report	Legislative Scrutiny: Coroners and Justice Bill (certified inquests)	HL Paper 94/HC 524
Seventeenth Report	Government Replies to the 2 <sup>nd</sup> , 4 <sup>th</sup> , 8 <sup>th</sup> , 9 <sup>th</sup> and 12 <sup>th</sup> reports of Session 2008-09	HL Paper 104/HC 592
Eighteenth Report	Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009	HL Paper 119/HC 726
Nineteenth Report	Legislative Scrutiny: Parliamentary Standards Bill	HL Paper 124/HC 844
Twentieth Report	Legislative Scrutiny: Finance Bill; Government Responses to the Committee's Sixteenth Report of Session 2008-09, Coroners and Justice Bill (certified inquests)	HL Paper 133/ HC 882

Twenty First Report	Legislative Scrutiny: Marine and Coastal Access Bill; Government response to the Committee's Thirteenth Report of Session 2008-09	HL Paper 142/ HC 918
Twenty-second Report	Demonstrating respect for rights? Follow-up	HL Paper 141/ HC 522
Twenty-third Report	Allegations of UK Complicity in Torture	HL Paper 152/HC 230
Twenty-fourth Report	Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims	HL Paper 153/HC 553

### Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079



# Oral evidence

## Taken before the Joint Committee on Human Rights on Tuesday 19 May 2009

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L  
Dubs, L  
Lester of Herne Hill, L  
Morris of Handsworth, L  
Onslow, E  
Prashar, B

John Austin  
Dr Evan Harris  
Mr Virendra Sharma  
Mr Edward Timpson

*Witnesses:* **Sir Ken Macdonald QC**, **Mr Daniel Machover**, Solicitor, Hickman and Rose; and **Mr Nick Donovan**, Head of Campaigns, Policy and Research, Aegis Trust, gave evidence.

**Q1 Chairman:** Good afternoon. This is the first of our evidence sessions in our inquiry into the UK legislation related to genocide, torture and related offences. We were going to have a second session after the current one at 2.30 with Redress, but we are postponing that because of the unusual circumstances of the Speaker's statement. We will try to get through everything by 2.20, so that we can adjourn then. We are joined by Sir Ken Macdonald QC, Nick Donovan, who is Head of Campaigns, Policy and Research at the Aegis Trust, and Daniel Machover, a solicitor from Hickman and Rose. Welcome to all three of you and, Sir Ken, welcome back in a "civilian" capacity. Perhaps I could start with you, Sir Ken. The Government has said that there is no obligation in international law to have universal jurisdiction over genocide, war crimes and crimes against humanity, but other countries, common law countries like New Zealand, Australia, Canada and the US, do have this universal jurisdiction. How does it work there?

**Sir Ken Macdonald:** I think that most of them, if not all of them, do not have universal jurisdiction; they have extraterritorial jurisdiction, which is a bit different. Universal jurisdiction is a state of affairs where we would be able to prosecute anyone found anywhere in the world who had committed that particular offence anywhere in the world. Extraterritorial jurisdiction means we can prosecute someone who is either resident or, if the law was amended, present in the UK who had committed that offence abroad. So there is quite an important distinction. I think it is only Spain that has universal jurisdiction over this offence, although Belgium used to. I will be corrected if I am wrong about any of this; but many other countries, including common law countries like New Zealand, South Africa and Canada have extraterritorial jurisdiction over the offence of genocide. European countries do too. I think that they manage perfectly well. There have been convictions in some of those countries on the basis of extraterritoriality; indeed, I think there have been convictions in at least one European country in respect of people from Rwanda who committed these categories of offences. I think that there is a

prosecution going on at the moment in the Netherlands of someone in a similar category, a Rwandan—the category of suspect that we cannot touch in this country. As the Committee knows, four Rwandans suspected of grossly genocidal behaviour have just been released by the High Court and are living freely in north London.

**Q2 Chairman:** Just to be clear, the difference between extraterritoriality and universality is that, if it is universal, presumably we could apply for extradition from anywhere in the world where the suspect happened to be.

**Sir Ken Macdonald:** Yes.

**Q3 Chairman:** Extraterritoriality means that if they happen to be in the UK we can prosecute them if they are resident, subject to any further changes.

**Sir Ken Macdonald:** At the moment the requirement is that they are resident, although some people, including myself, have proposed that we move—

**Q4 Chairman:** We will come on to that.

**Sir Ken Macdonald:** Can I say that, paradoxically, we do have universal jurisdiction over offences of torture and hostage-taking; but I am certainly not proposing that we move to universality in respect of other offences.

**Q5 Chairman:** Could I ask you this, Nick? The Government has said that the International Criminal Court (ICC) and the countries in which genocide and related crimes occur are best placed to prosecute these. What do you say to the Government about that position?

**Mr Donovan:** I think it is certainly right that, if it is possible, you should prosecute in the country in which the crimes are committed, both for the reasons of telling the truth about what happened to the crime and access to justice for the victims. If it is not possible, then you try to find another court which would take this up. The International Criminal Court is obviously a great innovation. It only covers certain countries in the world. Lots of countries have not signed up, and it is prospective. It looks forward

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from 2002. So any crimes that might be committed in countries that are not signatories to the Rome Statute or crimes which were allegedly committed before 2002 would not necessarily be covered. Then of course you have the problem of just skipping over a border. A lot of people, after they have committed a crime, travel across a border, perhaps to the UK. They cannot be prosecuted either in their home country or, if they came here and if they committed their alleged crime before 2001, here. So you rely on extraterritorial jurisdiction to fill in some of those gaps that the ICC cannot quite do itself, nor can the home country.

**Q6 Chairman:** The case that Sir Ken mentioned, the four Rwandans who are now living freely in north London, as he puts it—do you think that case may get the Government to think again about this issue?

**Mr Donovan:** I think that it is a very serious case. Obviously the four are innocent until proven guilty; but that is the whole point—they cannot be taken through a court procedure. It really shows the gap in the law in a very stark way.

**Q7 Chairman:** Presumably the only option at present in relation to those four would be if Spain, under their universal jurisdiction, decided to apply to the UK for extradition to Spain and they could try them there?

**Mr Donovan:** Now that we have failed to extradite them to Rwanda, yes.

**Q8 Chairman:** That seems a bit bizarre, does it not?

**Sir Ken Macdonald:** The problem with extradition in these cases, of course, is that often these offences take place in parts of the world where there are no developed justice systems or where malpractice on the part of law enforcement authorities is endemic. It is always likely therefore that the High Court will refuse to sanction the extradition of people like these, which creates a serious problem for us.

**Q9 Chairman:** So it is to dodgy countries in other parts of the less developed world?

**Sir Ken Macdonald:** Yes.

**Q10 Chairman:** But presumably there would not be such an objection should Spain seek extradition? We had all that with Pinochet, I suppose.

**Sir Ken Macdonald:** I do not suppose there would but—and I am sure you agree with this—we probably should not be relying on the Spanish to sort out our problems for us in this area.

**Q11 Chairman:** I personally would agree with that, but this is where we are. Daniel, do you want to add anything to any of these points?

**Mr Machover:** Yes. I think that what would be useful would be to consider each international criminal offence in turn and where the duties come from, and then what we have done about them in UK law. If we look at the Geneva Conventions Act, the reason we introduced universal jurisdiction over war crimes there was because of our 1949 Geneva Conventions obligations to do so under, in the Fourth Geneva

Convention case, Article 146. The Genocide Convention the year before—at that time diplomats thought there would be an international criminal court and so the concept of universal jurisdiction was not introduced. We did not have an obligation; therefore, when we legislated for that in the Genocide Act, we did not create a universal jurisdiction provision there. Clearly we could have done, in terms of our ability to prosecute. There was not a duty, as there was in the 1949 Conventions. I think that in that case Parliament back then got it wrong, because it could have introduced universal jurisdiction. We finally get it when we accede to the Rome Statute, but we do not get proper universal jurisdiction because we create a temporal problem. We make it a crime from when the Act came into force, and we introduce a requirement which was not in the Genocide Convention in terms of exercising jurisdiction, which is residence or nationality.

**Q12 Chairman:** We will come back onto both of those issues.

**Mr Machover:** Those are problems. Then, if you look at crimes against humanity, there has never been an international treaty on crimes against humanity *per se* which has introduced the concept of universal jurisdiction; but of course those were recognised as international crimes, going back as far as Nuremberg. Torture was separate because there was a separate Torture Convention. When we ratified that through the 1988 provision in the Criminal Justice Act, we created universal jurisdiction over torture. What we have an opportunity of doing, if the Government is amenable to it through the Coroners and Justice Bill, is to tidy up some of these provisions and create appropriate retrospectivity and appropriate jurisdiction over presence. We can go into that later.

**Q13 Mr Sharma:** We know that there have been 138 adverse immigration decisions resulting from war crimes investigations into individuals. Recently there were those four Rwandan citizens in court. How many other individual cases are you aware of in the UK? Is it a big problem?

**Mr Donovan:** My best guess, the short answer, is I think that there are a couple of hundred people, not all of whom would have sufficient evidence of the criminal standard of proof that you could bring cases against them. I think there might be a much smaller number. The Border Agency screened 1,863 people from 2004 onwards. It recommended action against 300 people and took action against 138; then 22 cases were referred to the Metropolitan Police. That is after 2004. The Rwandans and others might have entered before; so there might be some in addition to the 138. Then there might be some that the Government simply does not know about. I have a couple of other examples which I will come to when we talk about presence and residence; but I think the order of magnitude is maybe a couple of hundred, a smaller number of whom you would eventually go to trial for.

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**Q14 Lord Lester of Herne Hill:** As you will know, in the debate yesterday on the Coroners and Criminal Justice Bill there was support from all sides of the House for Lord Carlile of Berriew's amendment, still to come, to give retrospective jurisdiction. Lord Falconer of Thoroton deals with retrospection usefully at column 1221. I will not go into what he says there; but it is very important from a practical point of view to know what is the right approach to be taken to retrospectivity. There seems to be some inconsistency about the principle on which the dates have been chosen—this is really to Mr Donovan—for the retrospective application of universal jurisdiction in your proposed Bill, which is not necessarily the same as what Alex Carlile is proposing. Retrospective jurisdiction for genocide and war crimes is based on the later dates, when UK law recognised them; while jurisdiction for crimes against humanity would be based on the earlier date, when it was recognised in international law. Of course, Lord Falconer pointed out, as you have probably seen, that one can go back at least to 1994, if not to 1991, and under the Human Rights Convention. Could you explain the rationale for the dates you have chosen and whether you still think that is the right approach, or whether something different should now be put forward?

**Mr Donovan:** I would draw a distinction between what I originally chose, which is a conservative approach to retrospectivity, choosing the date on which it was certain that in UK law they had been crimes. In the case of genocide, it has been a crime in UK law, black-letter UK law, from 1969 onwards but it has been a crime in international law from 1948; so you could choose either of those dates. For crimes against humanity, the date on which it is certain regarding crimes against humanity, not committed necessarily in the context of a war, is 1991; that is the date that the UN, through its Security Council under a Chapter VII resolution, chose to codify crimes against humanity in statute for the International Criminal Tribunal for Yugoslavia, as alluded to by Lord Falconer. War crimes are much more difficult to ascertain. Different sets of war crimes became crimes at different times: 1907 for certain of the Hague Conventions; 1949; 1977 for the additional protocols. The approach that I would suggest the Committee might take is this. One of Sir Ken's predecessors conducted the Hetherington-Chalmers Report, which was the report into Nazi era war crimes, which lay the basis for the 1991 War Crimes Act. In there, they very carefully went through war crimes, crimes against humanity and genocide and chose which ones were crimes under international customary law at the time. They did this because it is legal under the European Convention on Human Rights, 7.2, which allows retrospective application of jurisdiction, and they did this because it was the most conservative approach allowable to them under customary international law. So they chose war crimes from 1939 to 1945 but not crimes against humanity or genocide. By extension, I would take their approach and look at when a crime is a crime in international

customary law and choose that approach. The short answer, therefore, is that I was incorrect because I was trying to be too conservative.

**Q15 Lord Lester of Herne Hill:** Can I clarify one thing? I understand what you have just said, which is different from your earlier position. Am I not right in thinking that that accords with the view taken by the European Commission of Human Rights in the marital rape case where you remember, after 300 years, the Law Lords decided that a husband raping his wife is criminal; and when an attempt was made by the husband rapist to say "... but this was retrospective", both the Law Lords, I think, and certainly the Commission, said "He must have known that raping his wife was an offence, even if it wasn't an offence under UK law at the time, and therefore he has no case". That seems to me to chime with what you are saying, but I see Sir Ken nodding.

**Sir Ken Macdonald:** I agree with that. It is worth reminding ourselves of what Article 7.2 of the European Convention on Human Rights said. It provides the prohibition against retroactive law, "... shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations". We would obviously say that that must include the offences that we are talking about here.

**Q16 Baroness Prashar:** The Ministry of Justice has said that different dates for UK jurisdiction over different crimes could create confusion for prosecutors, and therefore the case. Do you think that there is really a potential for confusion?

**Sir Ken Macdonald:** I respectfully disagree. Offences are subject to detailed guidance to prosecutors. Things like jurisdiction and the date from which an offence can properly be charged are primary aspects of that guidance. I would be surprised if modern prosecutors were not able to grapple with those relatively straightforward, factual concepts.

**Q17 Baroness Prashar:** So you do not think that it is a very genuine concern?

**Sir Ken Macdonald:** I do not think so. I respectfully disagree with him. I do not think that it would cause confusion.

**Q18 Baroness Prashar:** My second question is this. Again, they have said that making the law retrospective might affect already agreed amnesties. Do you think that is an issue?

**Sir Ken Macdonald:** I personally do not think it is. Nick Donovan has drawn to our attention a Strasbourg case called *Ould Dah vs. France*, where this was considered. The Strasbourg court in essence found that the public policy relating to the prosecution of these sorts of offences was so powerful that amnesties could not stand in their way, not least because amnesties would prevent victims from securing justice. Therefore, for the French to prosecute a Mauritanian army officer for acts of torture committed in his country in the early 1990s

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and who had later received an amnesty was perfectly proper and appropriate; and indeed he was convicted in France.

**Q19 Baroness Prashar:** You are saying there is experience elsewhere which—

**Sir Ken Macdonald:** I think there is Strasbourg learning and case law which shows that amnesties cannot stand in the way of prosecutions for offences which are this serious.

**Q20 Earl of Onslow:** The Government says that they have no evidence that the term “resident” as opposed to “present” represents any practical gap in UK law and that the UK is not a safe haven because suspects cannot become residents without risking prosecution. In your opinion is there a practical gap in the UK law which requires the change to “presence” as opposed to “residence”? Do you know of any cases which fall into this gap?

**Sir Ken Macdonald:** I can certainly say that the residency requirement creates difficulties for prosecutors in this sense: there is no settled definition of what residency amounts to in the English law, and residency means different things in different statutes. It has meant, and I think is likely to mean, that people who have been in this country for some time, present in this country for some time, could escape prosecution because they could be held not to be residents. For example, someone here to undergo or to enjoy a substantial period of medical treatment. The residency requirement also puts us out of line with other Commonwealth countries. Australia, New Zealand, Canada and South Africa have a mere presence requirement. The United States, under its 2007 Genocide Act, allows for prosecutions if, after the conduct required for the offence occurs, the alleged offender is brought into or found in the United States, even if the conduct occurred outside the United States. Many countries with very similar legal systems to our own have therefore plumped for a presence requirement rather than a residency requirement. The presence requirement makes life much simpler for prosecutors, because it simply means that if you are here you are at risk of prosecution, and we do not have to worry beyond that.

**Q21 Earl of Onslow:** Presumably “resident” would not apply if Mr Torturer comes here and wants to go for a three-week holiday in Frinton or something like that?

**Sir Ken Macdonald:** I think that it probably would not apply.

**Q22 Earl of Onslow:** You could not nick him.

**Sir Ken Macdonald:** You could not nick him and you may not be able to nick him if he was undergoing, say, five or six months of chemotherapy for example in a private hospital. It would be very debatable as to whether he was in law a UK resident rather than simply visiting the country.

**Mr Machover:** That would apply to crimes against humanity and Protocol II war crimes, but it does not apply to torture or to war crimes under the Geneva

Conventions Act. We have a presence requirement in effect already. There is an inconsistency between the criminalisation of torture and the reach of that in UK law, and of war crimes—that is, war crimes in an international armed conflict—and the other international crimes. That is the problem that I think creates confusion, not the problem that the Government have been pointing to.

**Q23 John Austin:** One of the points the Government has made is that it would be difficult to launch a prosecution against a person who was only temporarily in the UK, here for a short time, whereas Hickman and Rose have actually managed to get a warrant for the arrest of Major Almog, a senior Israeli army officer, in a very short space of time. How difficult was it to get that warrant? Is it likely that those circumstances could be repeated?

**Mr Machover:** I think the latter is a possibility in terms of repeating it, but it is all evidence-based. I cannot generalise. If the evidence has been collected by local human rights organisations and lawyers in the area and it is of an admissible nature, it can be used to prosecute someone in the UK, and it is of a high enough standard, then, wherever there is presence of such a suspect in the UK, that should be tested by the prosecuting authorities and, if the evidence is strong enough, there should be a trial. In the case of the citizen’s right, which is very limited, what they can do if the police are reluctant or do not have enough time to make a decision about using their ordinary arrest powers against somebody who is here temporarily, a citizen can apply to a court to obtain an arrest warrant. These are not two-minute hearings, like some applications for arrest warrants in front of magistrates; this was a long hearing where the magistrate took his duties very seriously. He had heard all of the previous, or many of the previous, such applications, and this was the first ever that was granted. Therefore, to answer this generally is impossible. The best answer is that it is all evidence-based. If the evidence is strong enough then the fact that someone is either present or resident here should not be the distinction; it should be, “Is there enough evidence to bring this person before the courts?”.

**Q24 John Austin:** So there may be difficulties but it is not impossible?

**Mr Machover:** No, it is not impossible and each case has to turn on its facts; but, to me, distinguishing on some arbitrary basis of residence or presence seems wrong. If they are present here in the UK they should be prosecuted, especially if that is what the treaty provides for. In the case of the Geneva Conventions and in cases of torture, that is what is provided for; so we certainly should not change any of that.

**Q25 John Austin:** Could I ask if you are aware of any ongoing cases in other countries? For example, there is the case of the former head of the Israeli secret service, Mr Ayalon, in the Netherlands.

**Mr Machover:** Yes, that is a case which my firm has also been involved in, because we helped the Palestinian Centre for Human Rights gather together the evidence in relation to that. There is

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going to be a case in August in the Criminal Appeal Court in the Netherlands, based on that case. The problem that arose there is that within the Netherlands they have a system where the Attorneys-General College advises the prosecuting authorities on whether there is an immunity issue. They advised them the day after Mr Ayalon left, knowing that he was there temporarily. The lawyers in that case are therefore challenging the delay of the Attorneys-General College in not giving that advice to the prosecuting authorities. That will be an important precedent in the Netherlands' law, because it will establish the duty to act quickly when it is known that the person is going to be present for a short period of time.

**Q26 John Austin:** Finally, in reality, if we did expand universal jurisdiction to non-residents for genocide, crimes against humanity and war crimes in internal conflicts, do you think this would result in any prosecutions?

**Mr Machover:** Again, it is evidence-based. My suspicion is yes, but I think that Nick and his organisation have been looking into that a bit more deeply.

**Mr Donovan:** To answer your question and that of the Earl of Onslow directly and are there practical examples, I believe that there are two categories of people: people who just come into the UK and then leave very quickly, and then some who for legal reasons do not have residence but are here for quite a long period of time. There is a man called Félicien Kabuga, not here in the UK but who has visited here, who was the financier of the Rwandan genocide. He bought, along with colleagues, 500,000 machetes in 2003; he funded the Interahamwe militia, and was the chief shareholder and president of the hate radio, RTLM. *The Times* reports that after he was given safe haven in Kenya he went to France and passed through Britain briefly on his way back to Kenya. He is an example of somebody who might be brought under this move from a residence to a presence requirement. There is also a gentleman called "Chuckie" Taylor who has just been prosecuted by the Americans, who is Charles Taylor's son—Charles Taylor, former dictator of Liberia—who was head of the anti-terrorist unit, including sawing off people's heads and other acts of war crimes; who also apparently visited France and the UK. We have some immigration files—remembering that the standard of criminal proof is a lot lower for those immigration files—which include people who are in the UK. The immigration judges believe that they have committed war crimes and crimes against humanity but, for good human rights reasons, they cannot be removed back to their country. Those include Afghan warlords, Somali warlords, a driver for an assassination squad in Sri Lanka—these types of cases.

**Q27 Earl of Onslow:** Would it be legislatively very difficult to put it right? Could it be done very quickly with a one-clause Act?

**Mr Donovan:** It would be very easy. You could, for example, borrow the language that the US uses in its Genocide Accountability Act, transport it, and replace the residence requirement with that type of language, which is the type of language which Sir Ken used earlier.

**Sir Ken Macdonald:** Could I briefly address that final question? I think that the likelihood of prosecutions, if the law were to be amended, is high. I think that there would be prosecutions.

**Q28 Lord Dubs:** Could I turn to the powers of the Attorney General? The proposed Bill retains the requirement for the Attorney General's consent to prosecute. Some organisations think that is not appropriate. I wonder what you believe the role should be for the Attorney General?

**Sir Ken Macdonald:** My view while I was DPP was that all decisions about prosecutions should be taken by an independent prosecuting authority, but that is a slightly broader point. At the moment, the Attorney General's consent is required for these offences, no doubt because of their international elements. For my own part, I would support a regime in which consent is required from the Director of Public Prosecutions rather than the Attorney General.

**Mr Machover:** Could I add one point to that? In several common law countries what happens is that the Attorney General does not have the role but publishes guidance on the use of the public interest test in an international criminal case. There is published guidance which is the Attorney General guidance, but it is sometimes specifically on international crimes. I think that is the case in New Zealand and Australia, but I may be corrected by others if they know otherwise. I think that certainly in New Zealand there is published guidance by the Attorney General, but it is the prosecuting authorities that apply that test. That would be the position I would favour: that there is transparent published guidance on when, in the extreme cases, the public interest might be better served by not bringing a prosecution. I think that there would have to be some debate and political accountability about that guidance.

**Q29 Chairman:** Would you have a problem with that, Ken? Supposing we have an Attorney General who guides the general framework about the application but the consent still has to come from the DPP. I presume that you would like a senior official like the DPP to give consent from the prosecution service rather than being somewhere lower down within the prosecution service.

**Sir Ken Macdonald:** I think that Daniel's proposal would put us in a better position than we are now, because the Attorney General's guidance would be published. However, I do not see any reason why the DPP should not publish his or her own policy, and you could achieve transparency in that way. I do not favour independent prosecutors being in effect directed by Members of Parliament who are also members of the Government. I have never thought

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it was the right process and nothing that I saw in my five years as DPP caused me to change my mind about it.

**Q30 Chairman:** So you would not have the Attorney General's guidance: just the DPP's guidance?

**Sir Ken Macdonald:** Yes.

**Q31 Lord Lester of Herne Hill:** By the way, I think that Sir Ken's view will be very important when the Constitutional Renewal Bill is published and debated in the summer. The Government say that there are considerable practical barriers to prosecution, for example, costs and difficulties with evidence, and these will not be alleviated by a change in the law. Do you agree? I guess that is for Mr Donovan first.

**Mr Donovan:** Yes, I believe there are considerable difficulties. Not insuperable. It has been done before in the UK and it has been done before in other countries. The Dutch team have just prosecuted a Rwandan for genocide. There is a case that is ongoing at the moment in Canada of a Rwandan who allegedly committed genocide. Here in the UK—which I am sure Sir Ken could talk about more—there was the case of Zardad, who was an Afghan warlord who kept somebody in a cave and brought him out to bite people when he was extorting money from them. He was prosecuted for torture and hostage-taking. But I will defer to Sir Ken about some of the difficulties.

**Sir Ken Macdonald:** Lots of categories of offence are difficult, time-consuming and complex to prosecute. Terrorism cases come into that category; money-laundering cases come into that category. This is a question of prioritising and devoting resources, if that is the desire of Parliament and if that will of Parliament is taken seriously by the prosecuting authorities. I think that you would need a specific police unit to conduct these investigations, as many other countries have. I always thought in my time as the DPP the appropriate place for these to be prosecuted was in the CPS Counter-Terrorism Division, which has very great expertise in prosecuting cases in this category with an international dimension. Zardad was prosecuted at the Old Bailey. We took the evidence by video link from the British Embassy in Kabul. He was convicted and sent to prison for 20 years. I did not regard that prosecution as a waste of resources or a waste of money. I thought it was very much in the public interest that, once we found this man living peacefully in south London, we should take him to court. We did, and the jury convicted him.

**Q32 Lord Lester of Herne Hill:** I suppose what the Government are saying is that they do not think that a change in the law would by itself alleviate the practice problems.

**Sir Ken Macdonald:** I think that they are right to this extent: that the prosecuting authorities and the police would have to take the decision to devote some resources to this area. One would hope that if Parliament expressed its will by changing the law, the pressure on the police authorities and the

prosecuting authorities to devote resource to these cases would be irresistible. I certainly have every reason to believe, although I do not speak for him, that my successor as Director of Public Prosecutions would be highly motivated to carry out these prosecutions if the law was changed.

**Q33 Chairman:** Could I raise one of those points with you? I have done quite a lot on war crimes from the Nazi period and I know that the Met merged their free-standing War Crimes Unit into the Counter-Terrorism Command. There has always been this tension, which I have continually been pressing for, to have it separated out again. It was merged before 9/11 and all that, when the terrorism threat was certainly not what we see now. Ever since then there has been a continual battle to try to get the Met to take some of these things more seriously, when they have all these other pressures on them. Ken, you said you think that it would be appropriate for a War Crimes Unit within the Crown Prosecution Service to be within their specialist terrorism prosecution section. Putting it in that context, do you think that there will always be a conflict, bearing in mind that the terrorism issue is always seen to be more immediate, therefore more demanding, and therefore the war crimes go to the back of the queue, which is what we have seen with the Met—until quite recently, when they seem to have woken up again?

**Sir Ken Macdonald:** You are absolutely right about what happened with the Met. I think we felt that quite strongly. We understood the pressure they were under and their reluctance to take officers off major contemporaneous terrorism inquiries and put them onto Rwanda, for example. We felt that in the CPS we could have a subset within the Counter-Terrorism Division which could deal with these cases and we were perfectly prepared to devote some additional resource to that. I simply think that our unit would have been best managed within the Counter-Terrorism Division, which is obviously a much smaller division than the Counter-Terrorism Command of the Metropolitan Police. We started off with about nine lawyers and went up to about 15 or 20. It is a small, easily manageable division. We felt that the group of lawyers looking at this category of offence would be best situated in there, and we could quite easily ring-fence resource for them. Keir Starmer might take a completely different view.

**Q34 Earl of Onslow:** We referred earlier to the four Rwandan men, who it appears we could not send back to Rwanda because it was assumed that they would not get a fair trial there. Is there not a United Nations' criminal court going on in Dar es Salaam? Why could they not have been sent there?

**Mr Donovan:** That is because it has been wound up by the UN Security Council. It would be the right way to do it.

**Q35 Earl of Onslow:** Could they not go to The Hague then?

**Mr Donovan:** The ICC only looks at crimes from 2002 onwards, so it cannot look backwards.

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**Q36 Earl of Onslow:** Are there quite a lot of people hung over from Rwanda? So why was it wound up?

**Mr Machover:** I think it is resources.

**Sir Ken Macdonald:** On grounds of cost.

**Q37 Chairman:** It has been short and sweet but very intensive and very helpful to us. Do any of you want to add anything that you think we have missed?

**Mr Machover:** I just want to add a footnote. There are a couple of other points that we raised in the document that was produced by Amnesty International, Redress and others, which relate to other aspects that are really important in international criminal law. There is the definition of torture or the defences, which we have pointed out is wrong in UK law. There is the problem about command responsibility, which is a very big issue. We are very much of the opinion that this again could be an opportunity to make clear that command responsibility in the purest sense is part of

English criminal law relating to both torture and to war crimes. That is not so clear, I am afraid, following the *Jones* and the *Pinochet* rulings of the House of Lords. We really need some more clarity on command responsibility in UK law. It would be a shame if, while we are looking at reforms to international criminal law in the UK, we do not deal with those points as well.

**Q38 Chairman:** A definition of torture is something we have been struggling with for some time. That is therefore an ongoing issue on our agenda. The other point we will certainly keep an eye on. Ken, is there anything you want to add?

**Sir Ken Macdonald:** No, thank you.

**Q39 Chairman:** Nick?

**Mr Donovan:** No.

**Chairman:** Thank you all very much. You have been very helpful to us. Thank you also for your written evidence.

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Wednesday 1 July 2009

Members present:

Mr Andrew Dismore, in the Chair

John Austin  
Dr Evan Harris  
Mr Virendra Sharma  
Mr Edward Timpson

Dubs, L  
Morris of Handsworth, L  
Onslow, E  
Prashar, B

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*Witness:* **Mr Kevin Laue**, Legal Advisor, REDRESS, gave evidence.

**Q40 Baroness Prashar:** Mr Laue, can I welcome you to the Committee? I am Usha Prashar; I am chairing this meeting until the Chairman arrives because he is sitting in the House of Commons. It would be very helpful if you would begin by telling us what you actually do; what is the remit of REDRESS?

**Mr Laue:** Certainly. Thank you very much, Chairman. The Redress Trust is a registered charity and non-governmental organisation. It is an international human rights organisation. Our mandate is to seek reparation for torture survivors. We were formed 17 years ago, in 1992; so we work with survivors or victims of torture and try to obtain justice for them in various forms.

**Q41 Baroness Prashar:** Is there anything that you want to say by way of introduction before we start asking you questions?

**Mr Laue:** Just to say that fairly obviously the Redress Trust supports the Torture (Damages) Bill and we have worked fairly closely with those involved with it.

**Q42 Baroness Prashar:** Thank you very much. I will start. The government has said that it does not have an international mandate to adopt universal civil jurisdiction regarding torture, and that it would breach our obligations under international law to do so. How do you respond to that?

**Mr Laue:** If I may rephrase the issue somewhat perhaps it would be helpful, rather than asking whether there is a mandate. We would suggest that the question should be: is the UK required to give immunity? In other words, is it under an obligation to bar civil claims against foreign torturers? Our position on that is that there is no such obligation to prevent litigants bringing cases in UK courts. In fact, we would say that there are good reasons for saying that the Torture (Damages) Bill should be passed to allow civil claims to be brought in the UK, for several reasons. It is a basic principle of international law now that all victims of serious or gross human rights violations have the right to access to justice. So at present with the status quo this access is denied to people who were tortured abroad if they wish to litigate through the UK courts. We would also say that the whole issue of state immunity is already one where there are exceptions to what used to be the absolute rule or the absolute bar to suing a foreign state. Therefore, the Torture (Damages) Bill is looking to create a further exception. It is not really all that radical, as the government might want to

suggest. A third point we would refer to is the Torture Convention itself—the United Nations Convention Against Torture. Article 14 obliges states to allow reparation proceedings to be brought, to make reparation. Of course, it has been said by some that Article 14 puts an obligation on the torturing state and not on, in this case, the UK, for torture that was committed abroad. This may or may not be right but the point is that it does not prohibit the UK allowing its courts to be used. It is clearly at the very least permissible. As has been said I think in other contexts we can perhaps look at it as the floor and not the ceiling of this issue. So in summary we would say that universal jurisdiction for a civil claim is not prohibited. We would also in fact like to pose the question to the government: if the government accepts that there are positive obligations towards torture survivors, which there clearly are if you look at the Torture Convention as a whole—a number of positive obligations—then why does it want to prohibit this further route, because the effect of continuing to have this bar is actually to grant impunity in many cases? So that is a rather long answer but the point I am trying to stress is that we think that the onus is on the government to be more forthcoming. How they want to deal with this problem is a real one, if they want to continue the status quo.

**Baroness Prashar:** That is very helpful.

**Q43 Mr Sharma:** In the Second Reading debate the Shadow Lord Chancellor, Lord Kingsland, said that the passing of the Bill would not necessarily enable private actions in UK courts, as the Bill intends, because of international law on state immunity. Do you agree?

**Mr Laue:** If I may answer this way? The point he was making was that if this Bill is passed and a litigant therefore is not prevented by the State Immunity Act the defendant state could still say that under international law the state being accused and litigated against is entitled to immunity. Our answer to that is that may be an argument that is raised at the time and the court would then have to decide whether international law allowed a state that bar. What this Bill is doing is dealing with domestic legislation, which currently the House of Lords has said to mean that there is no exception for torture. If I can also refer to what Lord Woolf said in that same debate, in answer I believe to the point that the minister had raised, that if the State Immunity Act had been passed after the Torture Convention—if

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the historical chronology had been the other way around—it might well have been that the State Immunity Act would have had an exception for torture. International law develops—it is not static—and we would certainly hope—and we think there are strong arguments—that once this domestic bar is dealt with the courts would be open to an argument that international law has moved on.

**Q44 Mr Sharma:** The US allows civil actions against torturers. How does it work there? And have there been many successful cases?

**Mr Laue:** The US position is considerably different to the UK position. If I could just briefly mention the key laws there? There is what is called the Alien Torts Claims Act, which is an old piece of legislation going back to 1789. What it allowed and allows is for aliens, non-US citizens, to bring claims in the US for a civil action under their law of tort, for claims arising from a violation of the Law of Nations or a Treaty of the US. So that has been used by individuals in the US, aliens in the US to bring claims. In practice it has meant that individual perpetrators who have been found within the US or have some connection with the US, and defendants have been successfully sued, yes. The other important piece of legislation is a much more recent one—the Torture Victims Protection Act—and what that did—and it has been amended but it was first passed in the 1990s—was that it extended that right to US citizens. So in summary, both foreigners and US citizens can actually bring claims based on torture, certainly against individual perpetrators. When one looks at the position of foreign states it is more complex because there the third important piece of legislation is called the Foreign Sovereigns Immunity Act and this does actually bring to bear this principle of state immunity, certainly for heads of states. The only real exception is that arising from the fourth piece of legislation, which is much more recent, called the Anti Terrorism and Effective Death Penalty Act. The Committee may have heard of the states that sponsor terrorism; there is a published list of states which the US administration regards as sponsoring terrorism. So if you are an alien or a US citizen and you have been a victim of torture by one of those listed states then you can actually sue that state and the normal immunity which a state has falls away. So it is considerably different to our position.

**Q45 Earl of Onslow:** Has there been any case of somebody suing North Korea, or whoever it may be—and I am taking their name as I suspect they are on the list?

**Mr Laue:** I am not aware of any cases which have actually been brought by individuals but we could research and we could report further on that.

**Q46 Lord Dubs:** Civil law jurisdictions, like France and Germany, allow compensation to follow criminal prosecutions. How does this work in practice?

**Mr Laue:** If I can point out firstly that there is no state immunity type bar on the continent in the civil law jurisdictions. Basically what happens is that an

individual complainant or victim of a crime—if I could just talk generally—would bring a complaint to the police against a perpetrator, an accused person, and in the course of those criminal proceedings the claim for compensation would be appended. So what it means is that in practice it is dependent upon the individual victim; and if he or she wishes to lodge a criminal complaint and then to claim damages as well, then that is possible.

**Q47 Lord Dubs:** Could we do that?

**Mr Laue:** No, because we have the strict division between criminal cases and civil law.

**Q48 Lord Dubs:** I meant could we do it if we changed our procedures? Would it be sensible to do it here?

**Mr Laue:** I think that would be such a radical change to our traditional separation of criminal and civil. What is interesting is—as I mentioned and I imagine the Committee knows—there is universal jurisdiction for the crime of torture so there is an anomalous position in fact. A torturer can be prosecuted under our law for the crime of torture if he comes within the jurisdiction, but you cannot bring a civil claim because of the state immunity barrier.

**Q49 John Austin:** Can I turn to the issue of exemplary damages, which the government has said that the extension of exemplary damages in civil proceedings is contrary to government policy. How important is it that exemplary damages are available?

**Mr Laue:** The way the Bill is framed at the moment, as you correctly pointed out, in the fact that it refers to words that exemplary and aggravated damages being available, could be amended. We recognise that the policy is that exemplary damages are really more a criminal sanction and should be dealt with in that way. We would say that aggravated damages, nevertheless, should remain.

**Q50 John Austin:** That would be compensation for humiliation—

**Mr Laue:** That is right; for mental—

**Q51 John Austin:** But the exemplary would be punitive.

**Mr Laue:** That is correct. We see the argument that the punitive aspect may not be appropriate. So if this Bill went to Parliament that could be amended.

**Q52 John Austin:** You think you might live with the government policy?

**Mr Laue:** Yes.

**Q53 Earl of Onslow:** There is a limit in the Bill of six years for bringing proceedings “beginning with the date when it first became reasonably practical for the person concerned to bring an action.” Amnesty International thinks that that six-year limit is unnecessary; what is your view on that?

**Mr Laue:** We can see precisely what Amnesty is saying and in principle they are making a valid point—a victim or a survivor of torture should not

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be bound by limitations. On the other hand, as we have set out in our written submission, there are a number of things in the Bill which have been put there to try and allay fears of opening what is called the floodgates of having too many claims. So this is a compromise; it is saying that it should not be open-ended—it could be but we accept it is politic to limit it—but we would want to extend the traditional period or the basic period of three years for personal injury to six years, so doubling it but not making it open-ended, to really narrow the ambit of it.

**Q54 Lord Morris of Handsworth:** Do you accept that it would be controversial and potentially detrimental to the UK's interests to seize foreign assets in enforcement of a judgment against another state?

**Mr Laue:** Can I answer that one in this way? If you are looking at this particular Bill it does not deal with that; it is simply to have a further exception to the State Immunity Act, to allow a litigant to litigate, where he or she has been tortured abroad, in the UK courts. The question of an enforcement, which is what your question raises, is another issue which would need to be dealt with. The question of foreign policy and of having problems with other states, yes, one has to acknowledge that that could upset another government. As it is, the State Immunity Act, even with commercial claims there are fairly complicated procedures involved, whereby you cannot simply seize another state's assets, even where it is arising from a contract. So these things would have to be faced. If foreign states argued that they were going to take some sort of retaliatory action then that would need to be dealt with. This happens. In the Pinochet case, for example—and I think this is referred to in our submission—the Chilean Government said that this was going to lead to a diplomatic crisis of some kind. States do that. But we would say that the UK should be taking a lead on developing access to justice. So we recognise that the question of enforcement is an issue but this Bill does not deal with that directly or even indirectly—it is simply allowing people to get to court and to bring a claim. If they obtain a judgment, if that happens I think a fair question is then: is it all a waste of time?

**Q55 Lord Morris of Handsworth:** Unenforceable.

**Mr Laue:** We are not saying that it is unenforceable; we are saying that there would be difficulties which would need to be dealt with. There is value in being able to get it to court. For example, one can speculate but possibly a state that is being sued would be embarrassed and would want to settle the

case to actually avoid it being aired in public. If, however, it was completely obdurate then the mere fact that a torture survivor has had his or her day in court and has obtained vindication can in itself be a partial victory. It is by no means, in that sense an all or nothing. There are cases outside of this issue where people get a judgment and maybe have problems in enforcing it if the defendant is a man of straw, and so on. But it does not mean that it is a waste of time. That is our position.

**Q56 Earl of Onslow:** Lord Kingsland in the Second Reading talks about the “range of difficulties connected with the appearance of the defendant and how the defendant is represented, and a raft of evidential issues which will have to be confronted and overcome before the Bill can have, if it were to become law, operational effect.” Considering all the evidential difficulties involved in cases against foreign people and countries for torture, how do you think the litigation process will work? For instance, when a state defends an action it perhaps may not be able to bring the witness concerned because the witness concerned is somebody who may have been holding and wielding the thumbscrews so he might get slotted when he got here. How do we get around that?

**Mr Laue:** REDRESS is here to campaign for plaintiffs, for survivors, for victims of torture. I accept that even in ordinary litigation there are rules and procedures which govern the production of evidence from abroad and those would apply. There are ways around this. Evidence can be taken on commission; if a defendant state or individual wanted to defend him or herself in a civil claim this could be done—there are ways and means of doing that by video link, possibly. I would answer though in a similar way to the answer I gave to Lord Morris, that the Torture (Damages) Bill does not seek to deal with all of these issues. They are or they would be matters which would need to be dealt with in litigation—we accept that and it cannot be run away from. But the purpose of the Bill is much more modest; it is simply to remove this barrier which prevents any of these further issues ever becoming relevant. It is a first step. But we do not believe that things like the production of evidence by either side are insurmountable if a litigant is allowed into court. It could be difficult in some cases but not impossible.

**Q57 Baroness Prashar:** Thank you very much indeed, Mr Laue; that is all from us. Thank you very much for your time this afternoon.

**Mr Laue:** Thank you for inviting us.

*Witnesses:* **Claire Ward MP**, Parliamentary Under Secretary of State, Ministry of Justice, **Ms Deborah Grice**, Head of Criminal Law Policy and **Mr Gilad Segal**, Senior Lawyer, Criminal Law, Ministry of Justice, gave evidence.

**Q58 Baroness Prashar:** May I welcome you, Minister, and your colleagues this afternoon. I am in the chair because Andrew Dismore, who is the Chairman, is sitting in the House of Commons, so I am taking his place this afternoon until he arrives. Is there anything that you want to say by way of introduction?

**Claire Ward:** No. Thank you very much first of all for inviting me to appear before the Committee.

**Q59 Baroness Prashar:** I will start because my questions are really about whether the UK should have universal jurisdiction for genocide, crimes against humanity and war crimes. The question is: why should we be able to prosecute someone for torture committed in Rwanda, but not for genocide committed at the same time and place? Is the distinction justifiable simply on the grounds of technicalities?

**Claire Ward:** I think it is important first of all to look at the fact that the legislation which Parliament passed in 2001 allowed them to look at this issue and to consider whether or not they should take a much greater jurisdiction—and certainly in respect of Rwanda—to go back, to be retrospective on that. They considered that and decided that they did not wish to do so. The difference essentially between the legislation around torture and the legislation as it stands around genocide is that the international community has decided collectively what it wishes to allow that position to be. That is not the case in respect of universal jurisdiction around genocide.

**Q60 John Austin:** Clearly with hostage taking and torture we are responding in our law to an international convention, which has been agreed. But there is an argument that we are following an international agreement and that is not an argument against us not extending the provisions for acts of genocide in internal conflicts. You said that we have to do the other because it is an international convention; we agreed with it. But there is not an international convention on genocide so we are not going to do it. But we could do it if we wanted it, could we not, and they have done so in New Zealand, Australia, Canada and the US. So if it works there why can we not do it here?

**Claire Ward:** There are considerable difficulties with extending jurisdiction and essentially taking jurisdiction. If it is not something that internationally has been accepted for a unilateral position in a state to do so. Where it has been done it has been done in discussions and in cooperation internationally, hence the position that we are currently in with torture. That is why it is a much more difficult position to do so for other offences. I think from the UK's point of view we would be seen, if we simply took the jurisdiction without that international agreement, as simply being a policeman of the world and not getting agreement to do so.

**Earl of Onslow:** But, Minister, there are I believe, in North London two gentlemen who have been fairly well established by the television companies to have been deeply involved in chopping people up in Rwanda and they seem to have been able to escape jurisdiction. I cannot for the life of me remember the exact reason why they have but it is pretty certain that they have. You probably know the cases of which I am speaking. It would seem awfully odd that if somebody's fingernails are pulled out and they are beaten up and they chop off the heads of 550 people with a machete that you cannot—

**Baroness Prashar:** Before you answer that question there is a supplementary to that from Lord Dubs.

**Q61 Lord Dubs:** The difficulty is that many people cannot understand how we can provide a safe haven for people who are suspected with genocide. It just does not stand well with our position in this country or our attitude to horrible crimes. I understand technically that there are difficulties but is there not some way forward to get over this gap in British law?

**Claire Ward:** I think we need, first of all, to look at what the government has done around this area, and the introduction of legislation in 2001 certainly provides protection from 2001 onwards. The issue on which many people are now having a debate is the pre-2001 period. Obviously there are lots of other things that we have been doing around the UK Borders Agency in stopping people who we believe may have been involved in genocide or war crimes or crimes against humanity from entering the UK and looking at it from that point of view. But I do not think that it is an easy issue, that we can simply reflect the 2001 legislation back without having consideration for some of the difficulties that it might cause. Obviously the Earl of Onslow has mentioned the issue around the Rwandan four individuals, where there has been some difficulty, who are alleged to have taken part in genocide. Clearly legislation is not going to be simply about trying to deal with four individuals; but the issue around Rwanda and genocide and the issue around alleged genocide that may have taken place earlier than that is something that I know is of debate. But it is not a simple issue, simply to be retrospective about it. I do not believe that the UK is a safe haven; I do think that we have taken strong action against people who would wish to come here, who may have been involved in such crimes.

**Q62 Lord Dubs:** I understand what you are saying but it does stick in people's throats that we have people here who, if they are guilty of the allegations, have done the most terrible things and they are still living in Britain. But can I go on? If we take at face value what you have just said—and there is no reason not to—that there are these difficulties, then are there any other options? For instance, I suppose that the Security Council could pass a motion so that the international criminal courts could prosecute; or perhaps even Spain could request extradition from

the UK, given that Spain does not have the difficulties that we have. What way would you see forward to get out of this serious difficulty?

**Claire Ward:** We are looking at all these difficulties and we are sympathetic to the issues that have been raised. We understand that there are these problems around the pre-2001 period. As I say, it is not a simple issue on which to proceed. I would not say that we should look too easily towards other countries to be able to solve that problem either. My understanding is that where universal jurisdiction has been in place with other countries, for example Belgium, they have stood back from this, my understanding is that Spain is already considering whether or not they should do so too. So there may not be that as a simple option. The first port of call clearly must be to look at whether or not the countries of origin, where these allegations of criminal activity may have taken place, are in a position to be able to conduct a prosecution, or, indeed, a third country may be in a position to do so. Those have to be the first ports of call.

**Q63 Lord Dubs:** Of course I understand that, but the difficulty is that if we go back to the poor Rwandans that is not an option. It might have been in the case of other people but not in their case.

**Claire Ward:** In the case of Rwanda, clearly one of the things that we are doing as a Government is doing what we can to support the Rwandan system of justice, to try and ensure that it is up to the full standards we talked about. The difficulty, as the Earl of Onslow has already referred to, is that those four alleged genocidaires from Rwanda are not in a position to be deported either.

**Q64 Earl of Onslow:** Is that because we think they are not going to get a fair trial in Rwanda?

**Mr Segal:** Perhaps I could come in there. The Rwanda Government made an extradition request for those individuals.

**Q65 Earl of Onslow:** They have or they have not?

**Mr Segal:** They did. That case progressed through the courts and the decision taken by the courts was indeed that they could not be extradited at this time, because there were concerns about whether they would receive a fair trial. That is the present position in respect of that case.

**Ms Grice:** Perhaps I could just add one extra point to that. As the Minister said, there is a lot of work going on which the UK Government is heavily involved in, in trying to build capacity in Rwanda and trying to get their system so that it is in a better place, basically. If that happens, and clearly this is a matter for the Rwanda Government, there is nothing to stop them putting in a further extradition request. Therefore, that door is not closed forever by the fact that we have had one decision that they could not be sent back.

**Earl of Onslow:** It does seem rather an odd arrangement.

**Chairman:** Could I first of all apologise to everybody? I am afraid that I have been defending the human rights of MPs in the House and I may

have to go back and do a bit more defending of human rights of MPs later on; but I am pleased that I have at least been able to get here for some of the session—and it is the Earl of Onslow's turn.

**Q66 Earl of Onslow:** We are talking about the retrospective application of this, and there are various different retrospective dates. When the Government has said that the dates proposed by Aegis would leave inconsistencies and some conflicts would still not be covered, should not the principle be that, wherever legally possible, the UK should have jurisdiction to prosecute? Do you disagree that international law permits jurisdiction from the proposed dates?

**Claire Ward:** As I think I have alluded to already, it is not simply a matter of reflecting the 2001 Act backwards to an earlier date. In respect of genocide, genocide has already been recognised for a considerable number of years as a crime internationally. Therefore, reflecting it back perhaps to cover the period of the early 1990s for Rwanda, and indeed the former Yugoslavia, may be an issue; but how far back would one want to go? If you look at war crimes or crimes against humanity, there are details of those crimes which it may not simply be possible to be reflected backward from the 2001 Act, because those details may not actually have existed in international criminal law at the time—trying to reflect backwards. So it is not as simple as saying, “Let’s take the legislation and make it retrospective to 1990/1991”. These are difficult issues. I would say to the Committee that we are aware of those difficulties. We are aware of the issues that are being raised, and the Justice Secretary has met with the all-party parliamentary group; they have made very strong representations on these issues; and it is something that we are looking at, we are considering, and we are very keen to hear the views of this Committee, because we hope that it will inform us as part of our deliberations on this issue.

**Q67 Earl of Onslow:** We come up, do we not, with the War Crimes Act passed by the Major Government, which did create retrospective legislation and it did create the charging of people with crimes before what they did was made a crime? There is surely a difference here, in that that one, as you know, was one of the very few times that the Parliament Act has been used, but in this one there are dates: 1948 for genocide; 1991 for crimes against humanity; and 1957 for war crimes. Those are the dates when the crimes were created internationally. Surely you could go back as far as to those dates, could you not? Would that not make sense?

**Claire Ward:** There is a difficulty with that. There are difficulties in terms of the legislation and the specifics of those crimes; but there is also a difficulty in the presentation of that, to have retrospectivity that is not common throughout those. My understanding is that, for example, somebody may well be alleged to have committed genocide. The genocide, as you have already alluded to, may go back to 1948. However, if the allegations and the prosecution were to fall short of genocide, they could well be liable for

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prosecution on crimes against humanity or war crimes; but the dates for those could not go back quite so far. Therefore, while there has been some debate about whether or not prosecutors would be confused by the dates—I am more than willing to accept that prosecutors and lawyers are used to this sort of change in dates and change in information, and if they cannot get that right then one would worry about their ability to prosecute—but there is an issue about how it is perceived and how victims would perceive it, and the ability perhaps not quite to meet the threshold of genocide, maybe meet the threshold for another crime, but not being able to prosecute it because the dates were not the same.

**Q68 Earl of Onslow:** You have now explained that extremely clearly. I now understand it. You say there is a difference in the standard in discussing this from genocide to crimes against humanity. Perfectly reasonable. Surely a good lawyer could explain that to his client whom he is representing. This is not an insurmountable question. All I think I am saying is would you not like to go away and think about it, and see if they are right or that the difficulties are insurmountable?

**Claire Ward:** Absolutely. I am willing to take all of this into consideration. That is exactly what the Government is doing at the moment. We have said that we understand the issue; we realise the difficulties that are being presented, and we are very sympathetic to that. We are considering all of these issues. That is why I think this Committee and the opportunity for us to hear what you have to say are incredibly important as part of our deliberations. We are in discussion with all the stakeholders on this issue and the wider issue of these three potential crimes.

**Q69 Chairman:** To pick up the point that the Earl of Onslow made there, the discretion of the prosecutor to decide at what level an offence should be charged is part of the prosecutor's ordinary bread-and-butter work. For example, if there is an offence against a person, whether to charge malicious wounding or ABH or common assault or grievous bodily harm—they are all gradations of the same thing and often the prosecutor will have to explain to the victim why a charge of ABH has been preferred, rather than malicious wounding. It may be on a bigger scale, but the difference between genocide and crimes against humanity is something that might have to be explained to a victim. It is exactly the same sort of test as deciding what dates apply when the CPS come to make the decision, surely?

**Claire Ward:** I think that there is also a perception issue. Given that if the Government were to decide to make further provision of retrospectivity, that would be a significant move for the Government. It would be a significant public statement about it. It would therefore, be difficult to have to uphold the difference between genocide and perhaps crimes against humanity for victims, who have not been able to ensure their case has reached the bar for genocide but might reach the bar for crimes against

humanity but are able to do so not because of the nature of the crimes but the nature of the dates that are in the legislation.

**Q70 Chairman:** Are you seriously suggesting that the public at large, or indeed victims of crimes, are going to object to retrospectivity because they might not think that the seriousness of the offence might get charged, and they would prefer not to have genocide back to 1948 because they want it coterminous with crimes against humanity? I cannot recall a great groundswell of opinion to say that we should let these people off because of the difficulties that prosecutors may face in deciding what is genocide and what is not.

**Claire Ward:** No, I am not suggesting for a moment that the public might not have a view on that. What I am suggesting, though, is that these are considerations the Government needs to take into account. It is also about the practicalities of it. For example, you are suggesting that we might go back to 1948 for genocide. I would suggest that there are some practical difficulties in terms of where we might find witnesses, where we might—

**Q71 Chairman:** That is a different question.

**Claire Ward:** But there is the public issue.

**Q72 Chairman:** That is a different question. That is the same question you have in relation to Nazi war crimes or anything. Whenever you have these offences, inevitably they are difficult to prosecute, because there is always—even if it is one that happened only last year—a great difficulty in getting the witnesses together, getting the statements together—as we have seen in the prosecution of the Afghan warlord. Incredibly difficult things to bring to prosecution, but that does not mean that you should not have the law right in the first place.

**Claire Ward:** It does not suggest that you should not have the law right in the first place, but it does suggest that you also need to bear in mind the practical realities and not simply putting onto statute legislation that, in reality, nobody can do anything about. Therefore, we need to consider that and we need to consider what the overall package is. As I said, we are thinking about this issue; we are sympathetic to the points that are being raised. There are various difficulties, some of which we are discussing now, that we need to bear in mind in our deliberations on this issue.

**Q73 Lord Morris of Handsworth:** This is following the same theme of retrospectivity, but for different reasons. The Government has said that making the law retrospective might affect already agreed amnesties. However, Sir Ken Macdonald pointed out that there is Strasbourg case law holding that amnesties cannot stand in the way of prosecutions for such serious offences—and case law is quoted. Do you maintain that amnesties are a barrier to making the law retrospective for these crimes? If so, why and which amnesties are relevant?

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**Claire Ward:** We certainly do not say that the UK is bound by previous amnesties, but we certainly need to consider them and bear them in mind. I think it would be fair to say that, whilst the Government's view is that individuals should not escape justice for these types of crimes, incredibly serious crimes, we would not want to pursue an avenue which risks increasing tensions and perhaps even rekindling armed conflict simply because we have something in place but we are not actually able to make some flexibility on a case-by-case basis.

**Q74 Lord Morris of Handsworth:** Can you give us one or two examples which have engendered such fear in the Government's approach to this policy?

**Claire Ward:** Perhaps I could ask one of the officials to reply.

**Mr Segal:** I do not have a particular example of an amnesty but, as the Minister said, it would not automatically act as a bar to a prosecution being brought if such an amnesty existed and there was retrospective application. Inevitably, any decision to prosecute would be a matter for the CPS to pursue and the Attorney General to consent to and, inevitably, the existence of an amnesty would be one highly relevant factor, among many others, to take into account.

**Q75 Lord Morris of Handsworth:** In the light of the cited case law, the Government's position in terms of damaging an amnesty must fall away, must it not? It cannot hold.

**Ms Grice:** Again, I am afraid I do not have any examples, but I think the reason why the amnesty issue may have been raised is because it was one of the points that was discussed during the debate on the 2001 Act. There was concern at that stage. I think that it is really just to register that there is an issue there that we need to be looking at, rather than this being something that would be an absolute bar to doing anything.

**Q76 Lord Morris of Handsworth:** It is not prohibited. That is what you are saying. It is a consideration.

**Ms Grice:** Yes.

**Q77 Lord Morris of Handsworth:** Why not just say that in simple language, so that we can all understand it?

**Claire Ward:** Perhaps I should reiterate it then: that essentially they are not a bar; they are something we need to bear in mind—in a process that allows the CPS, and possibly the Attorney General, to consider the case-by-case basis.

**Q78 Lord Morris of Handsworth:** Fine. That is what I wanted to elicit from you: whether you are prepared to look at it from a policy point of view on a case-by-case basis. Yes?

**Claire Ward:** They would have to be considered partly on a case-by-case basis, absolutely.

**Earl of Onslow:** Minister, I think it must be reasonable for governments—and I am taking the case of the gentleman who ran Haiti for rather a long time in a particularly brutal fashion. He was given a

large French villa to keep quiet. That then removes him from the scene of his nefariousness and makes the transition to a better government easier. I think that is something which governments are quite entitled to take into account in whether somebody should be prosecuted or not.

**Q79 Chairman:** I am not sure that I would agree with that.

**Claire Ward:** Obviously I cannot comment on specific cases, but the general principle holds that governments need to be able to consider this.

**Q80 Mr Timpson:** Staying with the theme of retrospection, the MoJ wrote a note for the Justice Committee in October 2008 which said, "Retrospection was firmly ruled out at the time Parliament debated the ICC Act 2001 . . ." There is some concern in this Committee that, having gone through *Hansard*, there appears to be no real or substantial debate about that issue. I would therefore be grateful—I am not necessarily suggesting that the Minister is able to point to it right now—if the Committee could be provided in writing with a reference to the part of the debate where proper consideration of that issue took place, to back up the statement that the MoJ made to the Justice Committee in October last year.

**Claire Ward:** I am more than happy to look at that issue, to find some further details and write to the Committee. Unfortunately, I am not in a position to answer that now.

**Q81 Earl of Onslow:** Another inconsistency in the UK jurisdiction over different international crimes is the residency requirement. Why should a foreign genocide suspect who comes on a shopping spree to Bond Street be free to go away again, when somebody who is resident should not?

**Claire Ward:** I am sorry, I did not quite catch that.

**Q82 Earl of Onslow:** It is visitors versus residents. In other words, if somebody who has a record of bloodthirsty disgustingness as long as your arm wants to come shopping in Bond Street, probably with nicked overseas aid, they get away with it; whereas if somebody happens to be a resident in this country they do not get away with it. Can you tell me why this is?

**Claire Ward:** The 2001 Act describes a UK resident as a person who is resident in the UK and if you have come here to go shopping in Bond Street—

**Q83 Chairman:** There is a better example and it is this. Somebody who is alleged to have committed genocide, if they are coming on the Bond Street shopping spree, cannot be arrested; but if somebody has committed torture—a nasty offence, alleged, but probably rather less than genocide—they can be arrested. Why do we have this inconsistency between genocide and torture, depending on whether you are resident or whether you are just here? In the end, it seems to be inconsistent that the more serious offence cannot be subject to arrest whereas the lesser one is.



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**Claire Ward:** Essentially, it is because the international community has allowed for that level of jurisdiction around torture but not in respect of genocide.

**Q84 Chairman:** It is because the UK Government has chosen to implement it in that way, not because the international treaties require that.

**Claire Ward:** There are international agreements about torture and hostage-taking, where the international community has agreed that universal jurisdiction should be taken over such offences. It has not agreed that universal jurisdiction—

**Q85 Chairman:** It is not universal jurisdiction. Let us make it clear. It is the basis on which somebody is in the UK. If somebody is in the UK and they live here permanently, that is one set of tests. If somebody is just coming to visit—and that could be for quite a long period, as a student or for medical treatment or a Bond Street shopping spree—that is different. To prosecute somebody for genocide, they have to be resident, *i.e.* permanently here, effectively, and not just coming as a student, for a Bond Street shopping spree or for expensive Harley Street medical treatment; whereas for torture it is different. Somebody who just turns up can therefore be arrested for torture, even if they are just here for the Bond Street shopping spree or a quick consultation in Harley Street. Why is there a difference between residency and presence with those two offences, particularly when the more serious one is treated more leniently?

**Claire Ward:** That is what Parliament decided in 2001. We certainly recognise that there is an issue about the clarity of the term “resident”. It is considered by the courts on a case-by-case basis as a matter of fact. One of the issues that we are taking into consideration at the moment is whether or not we can give greater clarity in the legislation for the courts, still allowing the courts to be able to have discretion but perhaps a little more clarity around those difficult issues which you mention.

**Q86 Chairman:** What causes confusion is the word “residency”. If you are trying to decide about someone who is a resident or who is not, that does cause confusion because you get an argument about length of stay, and all the rest of it. What does not cause confusion is the simple test: are they here or aren’t they? There is no confusion about that. Either they are in jurisdiction or they are not. Perhaps I could ask you what your opinion is. Do you think that people who are alleged to have committed genocide should be allowed to come on shopping sprees to Bond Street and not be arrested, or not?

**Claire Ward:** What we have said in the legislation—  
**Earl of Onslow:** No, that is not the question you were asked.

**Q87 Chairman:** It is a straightforward question. Do you think somebody who is alleged to have committed appalling genocide in a West African country or wherever, probably with their ill-gotten gains, as the Earl of Onslow has said, from pilfering

international development aid, who turns up in Bond Street with their cheque book—or, more likely, suitcase full of cash—and goes on a shopping spree to Asprey’s to buy loads of diamonds for his girlfriend, do you think he should be allowed to do that without facing arrest?

**Claire Ward:** I think it is about whether or not we are providing a safe haven for people to come to the UK. We make it quite clear that people who are coming to the UK, who are transitory in one form or another, are not simply seeking a safe haven. Those who are resident in the UK—a matter of fact about whether or not they are resident, determined by the court—are seeking a safe haven. That is essentially the distinction, on the basis of presence or residence.

**Q88 Earl of Onslow:** Minister, you are doing very well dodging bouncers but they are still going to come at you. The difference between the torturer who cannot go shopping but the genocidal maniac who can—what is the moral difference between those two? I cannot see it, but then perhaps I never went to university and various things like that, so I may not be clever enough.

**Claire Ward:** All I can say to you is on the basis of when the legislation—where it has been agreed on the international community about—

**Q89 Chairman:** This is not required by the international community; it is how we have chosen to interpret it. Other jurisdictions have different interpretations of this. We are entitled, if we want, to say that the genocidal maniac can be arrested the moment they step off the plane at Heathrow, if that is what we want to do. That is perfectly within our discretion under international law, yet we choose not to do so. What do you think it says to our moral authority in the world when we are effectively allowing all these murdering people—alleged—to come and have their treatment in Harley Street, or go shopping in Bond Street or attend a university course, with impunity?

**Claire Ward:** I would say that we also have to bear in mind that there are some practical difficulties in simply extending the legislation to cover presence rather than residence. In terms of presence—

**Q90 Earl of Onslow:** What are the difficulties?

**Claire Ward:** What are the difficulties? The difficulties are if you have somebody who is literally in transit from one country to another; planes are diverted; perhaps even an opportunity to physically divert a plane through hostage-taking, because somebody knows of someone who may well be on the plane who may be guilty of genocide. Issues around—

**Q91 Chairman:** Surely we should be making it difficult for these people to go around the world with impunity rather than making it easier?

**Claire Ward:** We are not making it easier. We are also looking at the practical issues of being able to enforce these matters. We are also looking at the impact that this will have in terms of our having to deal with other countries. We have to ensure that

there is some agreement on how these things are worked. If you look at other countries, how many of those have successfully taken those prosecutions? As I have said before, it is okay to put this legislation onto statute but you have to be able to ensure that it is going to work and it is going to be able to work practically.

**Q92 Chairman:** There is a whole raft of offences here where we do not have universal jurisdiction or extraterritorial jurisdiction. Is it not rather embarrassing that Spain can apply to the UK for extradition of some murdering, evil dictator for trial in Spain, and yet we cannot try them here?

**Claire Ward:** It might be worth considering the fact that the two countries that I understand did have that level of jurisdiction—Belgium has already rolled back from it and Spain are in the process of considering doing so. Therefore, that might actually suggest that there are a lot of difficulties with having that high level of jurisdiction. I think that we also need to bear in mind how that would be seen internationally, as the UK as the policeman of the world. We may have very strong views on this issue but this has been written into statute since 2001.

**Q93 Earl of Onslow:** We are not sending a gunboat up the Brahmaputra to arrest somebody; what we are doing is that, where somebody goes shopping in Bond Street who has a record as long as your arm for chopping people's legs off, or whatever it may be, he can be slotted. That strikes me as being a very simple thing to do and I can see no objection at all. We are obviously not going to get anywhere. You are doing absolutely brilliantly at bouncing the Chairman and myself, putting on not-a-very-good answer to what I hope is a decent question. Could we just ask you to go away and think about it, and to see what you can do? See if the Government could not find some way of addressing the feelings that have been expressed by both myself and the Mr Dismore.

**Claire Ward:** The commitment I can give to you is that we are considering all those issues. We are aware of those difficulties and, as I have said, we are looking at whether or not we can clarify the law in respect to what may be UK residence.

**Q94 Earl of Onslow:** If you do change your mind, I promise that we will not hold your previous answers against you.

**Claire Ward:** That is very kind, thank you.

**Chairman:** Let us look at some of the practical difficulties—alleged.

**Q95 John Austin:** Could I turn to the question of the Attorney General's role in relation to international crimes? It is the issue of separation of powers. Is it right that someone who is sitting in Parliament and sitting in Government should have the decision-making over whether the prosecution may take place or not? Would it not be better to leave this to the Director of Public Prosecutions?

**Claire Ward:** I think the level of crimes we are talking about are such serious and significant crimes that they also in most cases will have some impact

upon our international relations and, potentially, the UK's security. Therefore, it is important that not only the DPP has a view on this but that the Attorney General is in a position to take account—

**Q96 John Austin:** Are you really saying that political considerations apply when somebody is potentially guilty of the most horrendous war crimes and crimes against humanity?

**Claire Ward:** I think that it is not simply about political considerations; it is about public policy considerations and about taking into account the overview of the situation, which I think the Attorney General is in a position to do.

**Q97 John Austin:** The Attorney General can issue the guidance and it can be discussed and scrutinised and transparent, but the political role? Let us take a hypothetical case: the Israeli major. It was possible to get an arrest warrant, although it would have required the Attorney General's consent for prosecution; but the arrest warrant was obtained. Somebody tipped the guy off and he never arrived. But, had he arrived, the decision as to whether to prosecute would have been a political decision? Not on the merits of the severity of the crime?

**Claire Ward:** In normal circumstances, the decision by the Crown Prosecution Service to prosecute, at whatever level, will also take into account whether it is in the public interest. I believe, and the Government believes, that—certainly in crimes such as this and the impact that this may have upon international relations, potentially on UK security—these are issues that are of such a high level that, yes, they should be considered by the Attorney General, who will consider whether or not it is in the public interest to prosecute.

**Q98 Chairman:** What happened to ethical foreign policy?

**Claire Ward:** We have ethical foreign policy, and obviously all members of the Government bear in mind that foreign policy in everything they do.

**Q99 Lord Morris of Handsworth:** Can I continue with the barriers, the hurdles and the difficulties? The Government has pointed to “considerable practical barriers to prosecution” and they give some examples.—difficulties of cost and difficulties with evidence—and they noted that these cannot be alleviated by a change of law. Here they have the support of Sir Ken Macdonald, because he pointed out that there are lots of categories of offences which are time-consuming and complex to prosecute, like terrorism and money-laundering. The real question we have to ask here is a moral question, quite frankly. Are the practical problems regarding enforcement a good reason for not changing the law?

**Claire Ward:** There clearly are practical considerations. We have not argued that practical barriers to prosecutions are, by themselves, a good reason not to change the law; but we also need to be realistic about those difficulties, particularly in relation, for example, to genocide or to war crimes somewhere on the other side of the world. The

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realities of getting evidence, finding the witnesses, language barriers—there is a whole range of difficulties in terms of actually getting the evidence. We need to look not simply at legislation, therefore, but also at other things we can do to support those countries.

**Q100 Lord Morris of Handsworth:** And you would say that all these difficulties, like time, are higher than our moral obligation?

**Claire Ward:** No. I would say that in themselves they are not simply barriers to legislation; but, as I have said earlier, I think we also have a duty not simply to put onto statute legislation that may be there in principle but which in practice actually gives very little to victims—simply because the reality of the prosecution, of attempting to get a successful prosecution, would be incredibly difficult.

**Q101 Lord Morris of Handsworth:** But what about the deterrent factor? I might accept from you that in so far as some of the cases you cannot give redress to the victims, but what about the deterrent factor for future torturers?

**Claire Ward:** Future torturers would be covered by the 2001 Act, and therefore that is the deterrent. We already have that deterrent in place. So I would hope that anybody thinking about committing genocide now would recognise just how serious the legislation is, not just in the UK but internationally; but I do understand—

**Q102 Lord Morris of Handsworth:** You are not suggesting that the legislation will solve all these constraints that the Government cites now?

**Claire Ward:** Legislation in itself will not solve all of those problems. There are obviously lots of other things that governments can and should do. That is why we are working with other countries, through other departments and with the FCO. All of those things are taking place in any event. In terms of the legislation, it cannot be all.

**Q103 Lord Morris of Handsworth:** If you accept that legislation cannot be the be all and end all, you are coming back to the point of whether or not you have the will to act or the moral imperative to act.

**Claire Ward:** I think we have already made it clear that we have a moral view on this, which is why we have introduced the 2001 Act and why we have done so many other things. Our moral position on this is quite clear. The issue is do we make changes perhaps that make things retrospective? Do we make changes that change the terms in which somebody can be prosecuted? Do we do all of those things?

**Chairman:** Or do we make changes that say to all these murdering people, the war criminals, the torturers, the genocidaires, “Don’t come here because, if you do, you will be arrested”? Is there a deterrent impact with all this as well?

**Earl of Onslow:** “. . . but you may come shopping in Bond Street.”

**Q104 Chairman:** If you changed the law right, they would not come shopping in Bond Street; they would not come to Harley Street for their treatment; they would not come here on holiday; they would not come here to go to university. Is that not what we want? We do not want these people in this country, do we?

**Claire Ward:** We do not want people in this country who may be guilty of these things, but we have done a lot of the things around it; whether that be the 2001 Act, the work we are doing with the UK Borders Agency. Obviously, as I have already said, we are considering the other issues that have been raised as part of our ongoing deliberations. I am well aware that the legislation in the Coroners and Justice Bill is going through the House of Lords. And there are opportunities to continue this discussion over the coming weeks.

**Q105 Chairman:** If General Mladic suddenly turned up at Heathrow and went shopping in Bond Street—you may have an international arrest warrant, but put that to one side—you would not be able to charge him with genocide, would you?

**Claire Ward:** I cannot comment on what the circumstances of that would be. That would not be a position I could comment on.

**Q106 Earl of Onslow:** Given that there are already several exceptions to the state immunity rule for things far less egregious than torture, why does the Government not support an exception for torture?

**Claire Ward:** I did not quite catch that.

**Chairman:** We are going on to the Torture (Damages) Bill, in which I ought to declare an interest as having one coming up on Friday.

**Q107 Earl of Onslow:** I should have said that before. JUSTICE have said, “It is plain that the state immunity rule is hardly unqualified . . . a number of exceptions already exist . . . the question is whether torture is sufficiently serious to qualify as an exception, alongside claims for employment and interests in moveable and immoveable property”. Given that there are already several exceptions to the state immunity rule for things far less egregious than torture, why does the Government not support an exception for torture?

**Claire Ward:** Because it is a general principle of international law that one state is not subject to the jurisdiction of another, except in certain circumstances. Therefore we have not taken that position, simply to unilaterally assume jurisdiction over this area.

**Q108 Earl of Onslow:** My brief here tells me that there are some exceptions already. The Ministry of Justice tells us that. If the rule is absolute, I would understand, but it is not absolute.

**Claire Ward:** What are the exceptions?

**Q109 Earl of Onslow:** It says here, and I am cribbing, “. . . sufficiently serious to qualify as an exception, alongside claims for employment and interests in moveable and immoveable property”. There is a

footnote which says “JUSTICE . . . Torture (Damages) Bill Briefing for House of Lords Second Reading”.

**Claire Ward:** We are finding it quite difficult to hear you.

**Q110 Chairman:** Let me put it to you quite simply. Here we have jurisdiction which allows civil claims against foreign governments if there is an employment dispute or, if there is an argument about property, whether it is moveable property or buildings. We can sue them for that, but we cannot sue them for compensation as a torture victim. Does that not say something rather peculiar about our priorities?

**Claire Ward:** What it says is, when the UN adopted the 2004 Convention, it considered whether or not jurisdiction should be on criminal grounds or on civil. My understanding is that it determined that criminal, yes, but not to extend it to civil.

**Q111 Earl of Onslow:** Does that apply in France, where this clear distinction does not apply?

**Claire Ward:** I cannot speak for France, I am afraid.

**Earl of Onslow:** The point is that other states do not make that distinction.

**Q112 Chairman:** The United States Torture Victim Protection Act 1992.

**Claire Ward:** They may well have decided—

**Q113 Chairman:** France, Germany, Italy, Spain.

**Claire Ward:** They have decided to take that action. That is not in the normal round of what is done within the international community.

**Q114 Earl of Onslow:** So you could? Her Majesty’s present advisers could, if they wanted to?

**Mr Segal:** As things stand, a unilateral assumption of jurisdiction, as required by the relevant Bill, would raise an issue about our obligations, both our treaty obligations and under international law; because the UN Convention on Torture which was negotiated did not include an international civil cause of action, albeit that was considered. The option was discussed but not pursued.

**Q115 Earl of Onslow:** The Chairman has already given you a long list of countries that do give this exception to state immunity; so why cannot we?

**Claire Ward:** There are also some fundamental difficulties in providing for civil action on this.

**Q116 Chairman:** Let me read you Article 14 of the 1985 UN Convention Against Torture. “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.” Compensation, to me, sounds very much like a civil remedy.

**Claire Ward:** We provide for the criminal remedy, in terms of criminal jurisdiction, not for civil.

**Q117 Chairman:** Compensation is not a criminal jurisdiction.

**Claire Ward:** We also could not guarantee enforcement of it. If we were to allow civil jurisdiction for a civil action to be taken in respect of somebody alleged to have been a torturer, we could not enforce that action.

**Earl of Onslow:** Minister, you cannot guarantee anything in this life. People will go on disobeying the law; people will do torts to other people; and nobody can be guaranteed a permanent piece of justice, because it is not possible in humanity. It is no reason not to try.

**Q118 Chairman:** The point about it surely is this. If we do not have a problem allowing people to recover damages in a property dispute or an employment dispute—we do not have a problem with that, because we allow it to happen—what is the difference between that and somebody getting an award for damages for torture? It is exactly the same process to recover the compensation.

**Claire Ward:** I would suggest that it is probably rather more difficult—

**Q119 Chairman:** It is the same process.

**Claire Ward:** But rather more difficult in respect of somebody who has been found guilty of torture, whether that person is an individual, whether they are acting on behalf of the state. The state would retain immunity. That would be much more difficult to enforce.

**Chairman:** We will beg to differ on that one.

**Q120 Lord Dubs:** The Ministry of Justice has said that provision in the Bill for awards of aggravated and exemplary damages goes “against settled Government policy that there should be no statutory extension of the availability of exemplary damages in civil proceedings”. I know that we have been arguing about *any* damages in civil proceedings but, if we can get over that hurdle, why does the Government think there should be exemplary damages for some of the instances of torture that we have already talked about?

**Claire Ward:** I have to say, with respect, I am afraid we cannot actually get over the hurdle, which is that we do not accept that there should be the provision to apply for any damages. Therefore, the debate about whether or not they are aggravated damages or exemplary damages is, in a sense, kind of irrelevant—because we do not accept the premise of it in the first place.

**Q121 Lord Dubs:** I expected that answer. However, going back to civil actions against foreign states for torture, that is done in the United States for example. You have said that there are a lot of difficulties about that happening here. How do Americans get over these difficulties? How do they enforce their judgments?

**Claire Ward:** Perhaps I could ask one of the officials to tell you a little bit more about the United States’ position.

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**Q122 Lord Dubs:** Americans appear to be doing it and they do not seem to have the difficulties that you are suggesting we might have here.

**Claire Ward:** Except that my understanding is that they do have the difficulties, because it is not quite as wide as you might suggest in terms of their powers.

**Mr Segal:** I am not really in a position to comment on how other states practically have enforced their own law but, on the wider issue of other states, there is as yet no evidence that states generally recognise or give effect to an international obligation to exercise universal civil jurisdiction over claims arising from alleged torture. It is right that the US courts—and it is also right to point out, controversially—have been prepared to exercise extraterritorial jurisdiction in civil proceedings under the Act that one of the Committee members mentioned. It is worth pointing out that that is specifically against individuals who are alleged to have committed torture and not against states. Moreover, the International Court of Justice has itself expressed some scepticism as to the exercise of such jurisdiction by states generally. Those are also relevant factors to highlight for the Committee, therefore.

**Q123 Lord Dubs:** Could I say in more general terms, Minister, that you did say the Government was looking at all this. I hope that we have been helpful to you in what we have said, in that you can go back to the department and tell them that the present position is so difficult that there will have to be changes. I hope that we have been very helpful in that process.

**Claire Ward:** I can assure you that the Committee has of course been helpful in their contribution to this whole debate. The Government is looking at this. As I have already stated, the Justice Secretary has had a series of meetings, just as I have had meetings too with stakeholders, with the all-party parliamentary group, and we understand the serious issues that are being raised. The Justice Secretary has said that there have been some very strong arguments put forward. We are considering the points.

**Q124 Chairman:** Let me put this to you on the Article 14 point. You trained as a personal injury lawyer, I know. I practised as a personal injury lawyer, as you know. What does “an enforceable right to fair and adequate compensation” mean to you as a personal injury lawyer? Because I know what it means to me.

**Claire Ward:** With all due respect, I trained but I did not practise very long as a personal injury lawyer; so I certainly would not want to give any kind of legal advice these days on the matter. Essentially, we are providing some form of compensation, in a sense, to the victim; the compensation being that they are in a position to be able to take action for criminal activity.

**Q125 Chairman:** That is not compensation.

**Claire Ward:** It may not be a pecuniary or financial compensation.

**Q126 Chairman:** If it said “hold the torturer to account criminally”, that is one thing; but “compensation” means only one thing, in the *Oxford English Dictionary* or in personal injury law or in any other law in general, does it not?

**Claire Ward:** We are allowing for the victim to be able to get some redress in this matter.

**Q127 Chairman:** It does not say “redress”; it says “compensation”.

**Claire Ward:** I believe that compensation to be essentially a form of redress.

**Q128 Chairman:** It says, “obtains redress *and* has an enforceable right to frame adequate compensation”. Not “or”—“and”.

**Claire Ward:** As I think has already been stated, there are some serious practical difficulties to allowing us to be able to do that, one of which is that, essentially, by extending our jurisdiction we would be doing so, the Government believes, in contravention of the international position at the moment. Therefore, we are not in a position to do so unilaterally.

**Q129 Chairman:** Can I ask another question around the background to all this? In the case of *Jones v Saudi Arabia* the then Secretary of State for Constitutional Affairs intervened to persuade the House of Lords that state immunity in respect of civil proceedings and torture covered not only the state itself but also civil proceedings against his officials. We know it is a matter of public record that the Government came under pressure from Saudi Arabia to discontinue the SFO’s investigation into Aerospace, did the UK Government receive any communication from the Saudi Government concerning the Jones litigation?

**Claire Ward:** I am afraid I could not comment on an individual case, I am not in a position to do so.

**Q130 Chairman:** Would you like to investigate and write to me on that point?

**Claire Ward:** We could certainly—

**Q131 Earl of Onslow:** When you say you cannot comment, is that because you do not know or because you are not allowed to say?

**Claire Ward:** I just am not in a position to comment.

**Q132 Chairman:** Will you write to me on this point?

**Claire Ward:** I will write to you with as much information as I am in a position to give.

**Q133 Chairman:** Thank you. I think that is the end of the session. There is a lot for you to think about.

**Claire Ward:** Thank you very much.

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# Written evidence

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## Memorandum submitted by the Aegis Trust

### SUMMARY

1. The Aegis Trust welcomes the opportunity to contribute to this inquiry. It recommends that the law is changed to retrospectively apply the jurisdiction of British courts with regards to war crimes, crimes against humanity and genocide and to move from a “residence” test towards a “presence” requirement.

### INTRODUCTION

2. In 1989 Sir Thomas Hetherington and William Chalmers published the findings of their War Crimes Inquiry. They considered 301 allegations that people, who had subsequently become British residents, had committed war crimes in Nazi-occupied Europe between 1939 and 1945. They found three cases with a realistic prospect of a conviction for murder, and recommended that further investigations should be carried out in 75 other cases. They concluded that British courts did not have jurisdiction over the alleged crimes whilst alternatives, such as extradition to the Soviet Union or deprivation of citizenship and deportation, were unsatisfactory. Accordingly, they recommended that the law be changed to give British courts retrospective jurisdiction over war crimes. This led to the War Crimes Act 1991 and the establishment of a War Crimes Unit in the Metropolitan Police.

3. Since then both the legislative framework and the administrative resources put into war crimes investigations have improved. However, atrocities continue to occur in many contemporary conflicts, suspected war criminals continue to live in and visit the UK, legal “loopholes” remain, and extradition or deportation is not always possible.

#### *How many suspected war criminals are there?*

4. A definitive answer is impossible. Yet back-of-an-envelope calculations are available. One estimate of the numbers of perpetrators in the Rwandan genocide was 200,000.<sup>1</sup> Perhaps 20,000 Janjaweed militiamen and military personnel were involved in the killings in Darfur.<sup>2</sup> The late 2008 crisis in the eastern Democratic Republic of Congo (DRC) featured between 15,000 and 20,000 fighters.<sup>3</sup> When these numbers are considered alongside those involved in crises such as those in Zimbabwe, northern Uganda, Angola, southern Sudan, the former Yugoslavia, Burma, Ba’athist Iraq, and Cambodia, it is clear that the number of suspects who might be personally culpable could be over one hundred thousand. Perhaps more importantly, those in positions of command responsibility could, at least, number several thousand.

#### *How many in the UK?*

5. The total number of suspects in the UK is not in the public domain.

6. Since 2004 the war crimes team in the Border Agency has investigated 1,863 individuals for genocide, war crimes or crimes against humanity.<sup>4</sup> The specialist war crimes team recommended further immigration action for 16% (c.300) of these cases. Immigration action (including decisions to refuse entry, indefinite leave to remain and naturalization; and exclusions from refugee protection) was taken against 138 people.<sup>5</sup> Since 2005, 22 cases have been referred to the Metropolitan Police.<sup>6</sup>

7. In addition, in the UK there have been:

- Five Rwandan genocide suspects. One was transferred to the International Criminal Tribunal for Rwanda; four are fighting their extradition from the UK to Rwanda;
- Three suspects from the former Yugoslavia. Two have been the subject of extradition proceedings and one who had lived in the UK was arrested when visiting Serbia;
- One Afghan, who has been convicted in the UK of torture and hostage taking.

8. In comparison, in 2006–07 Canada screened 3,463 cases, resulting in 361 entries prevented, 31 exclusions and 35 removals.<sup>7</sup>

<sup>1</sup> Scott Straus, “How many perpetrators were there in the Rwandan genocide? An estimate,” *Journal of Genocide Research*, 6(1), March 2004, pp 85–98.

<sup>2</sup> Human Rights Watch, Sudan: Janjaweed Camps Still Active, <http://www.hrw.org/english/docs/2004/08/27/darfur9268.htm>.

<sup>3</sup> BBC News, Plea to halt DR Congo atrocities, <http://news.bbc.co.uk/1/hi/world/africa/7737013.stm>

<sup>4</sup> <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081014/text/81014w0013.htm#08101492000857>

<sup>5</sup> <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081113/text/81113w0013.htm#081113122000907>

<sup>6</sup> <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm081215/text/81215w0047.htm#0812167001568>

<sup>7</sup> Tenth Annual Report, 2006–07.

*How many cannot be prosecuted because of the date the crimes occurred or because they are not resident in the UK?*

9. The total number of suspects who could not be prosecuted because of the date the crimes occurred or because they are not resident in the UK is not in the public domain. However, the four suspected *génocidaires* currently fighting their extradition to Rwanda would fall into this category. The former Director of Public Prosecutions (DPP) said:

“As part of the extradition process, the CPS considered whether it would have jurisdiction to prosecute the four fugitives should extradition fail. This type of review is consistent with the obligation on States to either extradite or prosecute perpetrators of certain international crimes. We concluded that we didn’t have jurisdiction to prosecute them for acts of genocide or for war crimes committed in Rwanda in 1994.”<sup>8</sup>

10. Other suspects whose crimes were not covered by existing UK law and who could not be extradited, transferred or removed would also fall into this category:

- Extradition may not be possible if a British court believes that the suspect’s trial in another country would constitute a “flagrant breach” of fair trial standards;
- Transfer to an international tribunal or the International Criminal Court (ICC) may not be possible. The tribunals for Rwanda, the former Yugoslavia and the Special Court for Sierra Leone are winding down, and the ICC only has the capacity for a handful of cases each year;
- Removal to a country of origin or a third country may not be possible if there is a risk of torture on return.

11. The Hetherington-Chalmers Inquiry established the number of potential suspects by examining administrative records. A similar approach could be taken today: examining the Home Office–Border Agency “Warnings Index” and approaching other relevant agencies may shed light on the number of suspects and their status.

*What is the rationale for the differences in the legal regimes applying to the offences of genocide, war crimes and crimes against humanity committed abroad?*

12. At each stage of the development of international treaty law the UK has enacted the domestic legislation required to satisfy its international obligations, and has rarely gone beyond this. The result is that UK courts have jurisdiction over crimes committed abroad in the following years:

<i>Crime</i>	<i>Prosecutable if you are a UK resident and if crimes committed in following years?</i>	<i>Prosecutable if you are present on UK soil but not a UK Resident?</i>
Genocide	Yes—from 2001 (ICC Act)	No
Crimes against Humanity	Yes—from 2001 (ICC Act)	No
War Crimes—internal conflicts	Yes—from 2001 (ICC Act)	No
War Crimes—Nazis	Yes—1939–45 (War Crimes Act)	No
War Crimes—international conflicts	Yes—from 1957 (Geneva Conventions Act)	Yes—from 1957
Torture	Yes—from 1988 (Criminal Justice Act)	Yes—from 1988
Hostage taking	Yes—from 1982 (Taking of Hostages Act)	Yes—from 1982

13. There is no sound rationale for the different treatment of those suspected of crimes in Nazi-occupied Europe and those related to more recent crises. The Holocaust may rightly be regarded with a particular horror, but the survivors and victims of events in Rwanda, Zimbabwe, Burma and elsewhere feel the same need to see justice done.

*Should the law be changed to ensure it is more consistent?*

14. Yes. The law should be amended in two ways: first, to retrospectively apply the jurisdiction of UK courts to genocide, war crimes and crimes against humanity to crimes committed before 2001. Second, to move from a “residence” to something akin to a “presence” test.

(i) Retrospective application of jurisdiction

15. The retrospective application of jurisdiction is not the same as retroactively creating a new law—which would be contrary to the basic legal principle of “no crime without law”. Such retrospective application of jurisdiction is compatible with human rights law: the framers of both the ECHR and ICCPR

<sup>8</sup> Speech given to the All Party Group on Genocide Prevention and Parliamentary Human Rights Group, 2008.



drafted clauses to allow for the retrospective application of jurisdiction relating to war crimes, crimes against humanity, genocide and other similar crimes, so long as they were recognized as such by customary international law at the time of the offence.<sup>9</sup> These clauses have been used to retrospectively apply jurisdiction in countries including Senegal,<sup>10</sup> New Zealand,<sup>11</sup> Norway<sup>12</sup> and the UK (the 1991 War Crimes Act).

16. The Hetherington-Chalmers Inquiry considered this question:

“...by 1939 ... violations of the customs and uses of war, or war crimes as they were later called, were internationally recognized as crimes, both Britain and Germany being among the signatories of the Hague Conventions which confirmed them as such. The Nuremberg judgment also held that such acts were also recognized as crimes under customary international law, which bound even those nations which had not become party to the Conventions. Genocide was not recognized until 1948 and we find the position of what were subsequently called crimes against humanity to be unclear ... *Therefore it can be argued that enactment of legislation in this country to allow the prosecution of “war crimes” in British courts would not be retrospective: it would merely empower British courts to utilize a jurisdiction already available to them under international law since before 1939, over crimes which had been internationally recognized as such since before 1939 by nations including both the United Kingdom and Germany. We are less certain that a similar stance can be adopted with regard to crimes against humanity.* “[Emphasis added]<sup>13</sup>

17. Following this line of reasoning it might be sensible to retrospectively apply jurisdiction to the date in which the crime was incorporated into UK law or, in the case of crimes against humanity, were definitively recognized as crimes in customary international law.

- Genocide—from 27 March 1969, when the *Genocide Act* entered into force;
- Crimes against Humanity—from 1 January 1991, when the United Nations, through the adoption of the Statute of the International Criminal Tribunal for the former Yugoslavia, recognised crimes against humanity as a crime which was “*beyond any doubt part of customary law*”.<sup>14</sup> This was the approach used by New Zealand when incorporating the Rome Statute into domestic law;
- War crimes—from 31 July 1957, when the *Geneva Conventions Act* entered into force.

(ii) Presence

18. Currently, only UK residents can be prosecuted for war crimes, crimes against humanity and genocide committed after 2001. The definition of residency in the ICC Act is rather circular: “a ‘United Kingdom resident’ means a person who is resident in the United Kingdom”.<sup>15</sup>

19. This residency test does not apply to people suspected of grave breaches of the Geneva Conventions committed after 1957, and torture committed after 1988.

20. The value of introducing an extra hurdle relating to residency into the decision to prosecute is questionable. The former DPP stated: “Ultimately this is a matter for Parliament to decide. But I think we can say that current residency requirement presents certain difficulties for the CPS. And it lacks certainty.”<sup>16</sup>

21. Something akin to a simple presence requirement would bring the UK into line with other common law countries such as Australia, New Zealand, Canada and South Africa. The US in its 2007 Genocide Accountability Act allows for prosecutions if “after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States.”

*What are the practical consequences of change, for example in terms of police resources required to investigate such crimes?*

22. The Hetherington-Chalmers Inquiry recommended that “Adequate resources should be made available...to the respective investigating and prosecuting authorities and the courts to allow war crimes to be fully investigated and, where appropriate, prosecutions to take place.”<sup>17</sup> Following the 1991 War Crimes Act a specialist unit was established in the Metropolitan Police service (MPS)—which was disbanded in the late 1990s.

<sup>9</sup> Article 7 (2), ECHR.

<sup>10</sup> Human Rights Watch press release 22 July 2008,

<http://www.hrw.org/en/news/2008/07/22/senegal-government-amends-constitution-pave-way-hiss-ne-habr-trial>.

<sup>11</sup> Juliet Hay, “Implementing the ICC Statute in New Zealand,” *Journal of International Criminal Justice*, pp 191–210, 2004.

<sup>12</sup> Redress and African Rights, “Extraditing Genocide Suspects From Europe to Rwanda: Issues and Challenges,” 2008.

<sup>13</sup> War Crimes: Report of the War Crimes Inquiry, 1989 HMSO Cm744, paragraph 6.44, pp 63–64.

<sup>14</sup> Secretary-General’s Report on the ICTY Statute, 3 May 1993 (S/25704), paragraph 34.

<sup>15</sup> International Criminal Court Act 2001, part 5, 67 (2).

<sup>16</sup> Speech given to the All Party Group on Genocide Prevention and Parliamentary Human Rights Group, 2008.

<sup>17</sup> War Crimes: Report of the War Crimes Inquiry, 1989, HMSO Cm744, paragraph 10.9, p 107.

23. In 2003 the Metropolitan Police made a bid to re-establish a war crimes unit—applying for £1.139 million funding to the Greater London Authority. The budget submission set out the rationale:

“War Crimes currently sits within SO13 (Anti-Terrorist Branch). It is a commitment the MPS have to undertake—yet not independently funded or staffed. Current workload has increasing impact on staff available to undertake other SO13 core roles. The increasing number of war crime investigations clearly warrants its own Unit, if SO13 are to continue within this investigative area....

And the “consequences of not obtaining funds”:

Clearly impacting upon core roles of this OCU—SO13 suffer the loss of one full investigation team to staff this function at the moment—decrease in high level of service is always a possibility—reputation in relation to the MPS’s ability to investigate such crimes could be up for scrutiny.”<sup>18</sup>

The requests for the increase in funding (2004–5) was turned down by both the GLA and Home Office and instead funded through the use of year-end reserves.<sup>19</sup>

24. The main responsibility of SO15 (the successor to SO13) is counter-terrorism. It is also responsible for “Reactive investigations including crimes against humanity”.<sup>20</sup>

25. Other countries have established specialist war crimes units: Canada, Denmark, Netherlands, Sweden, Norway and Belgium. One analyst concluded that “With the exception of two cases where private parties played a leading role, specialized units successfully investigated and prosecuted all serious international crimes cases leading to a conviction since 2001.”<sup>21</sup> In Sweden, the War Crimes Unit comprises 10 investigators and has a budget of US\$2.6 million for 2008–09. There are currently 30–40 investigations ongoing in Sweden.<sup>22</sup>

26. Changes in the law may have a resource implication for the police, prosecutors and the courts. However, a greater influence may be political guidance given by Parliament, the Government and the Greater London Authority about the relative importance of the investigation and prosecution of crimes against humanity, particularly against the backdrop of a heightened terrorist threat.

*Should the UK become a global prosecutor?*

27. No. Transfer to an international tribunal or extradition is preferable to prosecution in the UK. We do not recommend any changes to the various immunities enjoyed by serving heads of states and officials. Neither do we recommend any change to the current roles of the DPP and Attorney General in the decision to prosecute.

28. Prosecutions should remain, as now, rare. However, the decision to prosecute should be based on the strength of the evidence and an assessment of the public interest rather than on whether the date and type of international crime fits with our current patchy legal framework.

*March 2009*

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#### Supplementary memorandum submitted by the Aegis Trust

The Aegis Trust welcomes the Government’s decision to reform the laws on genocide, war crimes and crimes against humanity by retrospectively applying the jurisdiction of the UK courts to 1 January 1991. The Government is proposing not to move from a residence to a presence requirement, though has pledged to give more “certainty” as to who may be considered a British resident.

The retention of a residency test could potentially allow the following categories of people to stay in the UK without fear of prosecution:

- Visitors, including those on business visas—who currently have visas of up to six months;
- Students—who can stay the full length of their course (conceivably three or four years) plus three months;
- Domestic worker and academics—up to 12 months;
- Skilled workers—up to three years; and
- Asylum seekers who cannot be deported but where residence is being denied through the process of refusing asylum status under Article 1F(a) of the Refugee Convention—currently allowed to stay indefinitely, until such time as they can be removed.

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<sup>18</sup> <http://www.mpa.gov.uk/downloads/committees/mpa/mpa-031030-7a-appendixc.pdf>

<sup>19</sup> <http://www.mpa.gov.uk/committees/x-f/2004/041207/05/>

<sup>20</sup> <http://www.mpa.gov.uk/committees/x-eodb/2007/070712/06/?qu=crimes%20against%20humanity&sc=2&ht=1#h2005>

<sup>21</sup> Juergen Schurr, *Ending the Culture of Impunity*, in (ed) Nick Donovan, *Enforcement of International Criminal Law*, Aegis Trust, 2009.

<sup>22</sup> <http://www.thelocal.se/8454/20070911/>

The publicly given reason for retaining a residence test is that: “Our aim is not to become a policeman for the world. As a general rule, if such individuals arrive here and are known to be suspected of an offence of such a serious nature, they may well be turned back at the port of entry.”<sup>23</sup> The unstated reasons are based on first, a fear of offending key allies if their personnel are investigated when visiting the UK; and, second, worries about the cost of monitoring large numbers of people travelling through British airports.

At this point it is worth restating that:

- existing state and diplomatic immunities would not be affected by the proposed reforms;
- the Director of Public Prosecutions and Attorney General would retain their role in assessing whether a prosecution was in the public interest; and
- presence requirements (in all but name) already exist in the UK for torture and Grave breaches of the Geneva Conventions, and a presence requirement exists in Canada, New Zealand, Senegal, South Africa and the USA. These do not appear to cause major problems.

The problem is this: how to design a legal framework which would enable (not require) the prosecution of a future visitor such as Felicien Kabuga, the Rwandan who allegedly bought several hundred thousand machetes in 1993; while not requiring the prosecution of the citizens of key allies and all the while operating within limited budgets.

The answer is to trust the police, Crown Prosecution Service, and Attorney General to use their discretion wisely, and to draw up criteria for the prioritisation of cases which allow for the use of limited budgets.

Canada has had a comprehensive legal framework since 2000 when they backdated crimes against humanity to 1945, and introduced a test based upon presence rather than residence. The Canadians have a co-ordinated “War crimes program”. A File Review Sub-Committee (FRS) brings together four key government departments and agencies: the Department of Citizenship and Immigration, the Department of Justice (DOJ), the Canadian Border Services Agency, and the Royal Canadian Mounted Police (RCMP). The FRS recommends further action by a specific organization. The legal remedies include: deportation; revocation of citizenship and deportation; transfer to an international tribunal (upon request); extradition (upon request); or criminal investigation and prosecution.

The criteria employed by the FRS have recently been published:<sup>24</sup>

In order for an allegation to be added to the RCMP/DOJ inventory, the allegation must disclose personal involvement or command responsibility, the evidence pertaining to the allegation must be corroborated, and the necessary evidence must be able to be obtained in a reasonably uncomplicated and rapid fashion.

In certain circumstances a file may be added to the RCMP/DOJ inventory where these conditions are not met. These include the following:

- The allegation pertains to a Canadian citizen living in Canada or to a person present in Canada who cannot be removed for practical or legal reasons.
- Policy reasons such as the national or public interest, or overarching reasons related to the interests of the war crimes program, international impunity or the search for justice exist.

Since 2000 Canada has often used immigration action to remove suspects, have prioritised within a small budget, and only once used the courts—to prosecute a Rwandan for war crimes, crimes against humanity and genocide. The Canadian example shows how robust laws can coexist with limited budgets and foreign policy concerns. It would be perfectly possible to design such criteria for use in the UK. It would also be possible to draw up a definition of “presence” which excluded those in transit.

The proposed retention of a residence test is an attempt to retain an inadequate legal framework in order to use it as a substitute for the robust use of public interest test.

*14 July 2009*

<sup>23</sup> HL Deb, 7 July 2009, c658.

<sup>24</sup> Terry Beitner, Canada’s approach to file review in the context of war crimes cases, in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, PRIO, 2009  
[http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20\(2009\)%20\(criteria\).pdf](http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20(2009)%20(criteria).pdf)

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**Letter From Theodore Simburudari, President of Ibuka**

**RE: JOINT COMMITTEE ON HUMAN RIGHT INQUIRY INTO UK LEGISLATION RELATING TO GENOCIDE, TORTURE AND RELATED OFFENCES**

I write to you as the president of Ibuka, the umbrella survivors' association in Rwanda. We are aware that there are currently four Rwandan genocide suspect in the UK, fighting their extradition to Rwanda: Emmanuel Nteziyayo, Charles Munyaneza, Celestin Ugirashebuja and Vincent Binyinya. Two of these men, Nteziyayo and Munyaneza, were Mayors during the 1994 genocide – the former is alleged to have played a role in the massacre of tens of thousands of Rwandans at the Murambi Technical College, near to the town of Gikongoro in the south of the country.

Whilst we hope that they can face trial in Rwanda, we understand that the British High Court may follow in the steps of the International Criminal Tribunal for Rwanda—and more recently Finland—and not permit extradition.

If the UK does not permit extradition then we call on you to urge your government to ensure that the suspect can face trial in the UK for their alleged crime. We understand that at present British courts do not have jurisdiction over acts of genocide committed by foreign nationals outside the country (even if they are UK residents). If that act of genocide was committed before 2001. We call on you to put pressure on your government to amend the law so that these suspects can face justice.

April 7th marks the 15th anniversary of the genocide. While this year we survivors want to give a message of hope for the future, the knowledge that suspected organisers of genocide may find a safe haven in the kingdom will cast a shadow over our event. However knowing that you will help in the effort to stop suspects enjoying impunity for the alleged crimes will strengthen the feeling of hope.

*12 March 2009*

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**Letter from Tom Porteus, London Director, Human Rights Watch, to Rt Hon Jack Straw MP, Secretary of State for Justice, dated 12 May 2009**

We write to express concern over shortcomings in the International Criminal Court Act (ICCA) of 2001, particularly with respect to jurisdiction over the crime of genocide. We urge the government of the United Kingdom to amend the ICCA in order to ensure that the world's worst crimes, including crimes of genocide, may be prosecuted in UK domestic courts and to prevent the UK from becoming a refuge for the perpetrators of the heinous crimes.

On April 8, 2009, the High Court of Justice denied the extradition to Rwanda of four Rwandans accused of participation in the 1994 genocide. The Court made extensive reference to the submissions of Human Rights Watch to the International Criminal Tribunal for Rwanda (ICTR) that accused persons cannot be fairly tried in Rwanda and to our report on the Rwandan judicial system released last year. However, instead of then recommending their prosecution in the UK, the court released all four suspects.

Under the ICCA, jurisdiction for genocide is limited to crimes occurring after June 2001, when the law came into force, where the crime is committed in England, Wales, Northern Ireland or Scotland (in the case of the ICC (Scotland Act), or where it is committed overseas and the alleged perpetrator is a UK national or resident or subject to UK service jurisdiction. Since the offences in question were committed outside the UK prior to June 2001 and the suspects are not UK citizens, residents or service personnel, it appears they cannot currently be prosecuted for genocide in the United Kingdom.

Human Rights Watch is deeply concerned by this outcome. While we opposed extradition of the four men to Rwanda, beginning in October 2007 we publicly called on the UK to prosecute them for war crimes or torture. We remain strongly of that view.

We also called on the UK to amend its law and, consistent with international law, allow for prosecution of the crime of genocide regardless of where or when it was perpetrated.

We believe it is imperative for the United Kingdom to amend the ICCA as a matter of priority to close the impunity gap highlighted by the crimes alleged to have been committed by the four individuals released last month by the High Court as well as to ensure that crimes of genocide and other serious international crimes committed by others found in the UK are prosecuted. The law should be amended in at least three ways.

First, the law should allow for prosecutions for acts dating back to at least 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly. The principle of non-retroactivity for criminal offences does not prevent a crime from being prosecuted under national law so long as the conduct proscribed was criminal under international law at the time it occurred, as recognized in Article 7 (2) of the European Convention on Human Rights and Article 15 (2) of the International Covenant on Civil and Political Rights. The ICCA should be amended to provide for criminal liability where the conduct in question constituted an offence under either UK or international law at the time it took place.

Second, the universal jurisdiction provisions of the ICCA should be cast as broadly as possible. The current law requiring the accused to be a UK national or resident or subject to UK service jurisdiction in England or Wales, or the crimes to have taken place in England, Wales, Northern Ireland or Scotland (in the case of the ICC (Scotland) Act), is too restrictive and weakens the UK's ability to pursue justice for such heinous crimes. We recommend providing jurisdiction over all persons suspected of ICCA offences, wherever committed and regardless of the nationality or place or residence of the alleged perpetrator or victim.

In the United States, for example, the 2007 Genocide Accountability Act provides domestic courts with jurisdiction over crimes committed (i) in the US; (ii) by US nationals, US residents or stateless persons living in the US; or (iii) by persons brought into or found in the US after the alleged crime which occurred outside of the US. A similar provision would enable the UK to ensure that those who have committed grave crimes abroad do not escape justice by travelling to or residing in the United Kingdom.

Finally, the ICCA should be amended to remove the requirement under article 53 (3) that the Attorney General consent to the prosecution. Allowing a government official to determine whether or not to prosecute suspects of serious international crimes jeopardizes the independence of the prosecutorial process. As you are fully aware, proposals to remove or severely curtail the Attorney General's role in prosecutions have been on the agenda since Gordon Brown became Prime Minister, as part of the new constitutional settlement, but with little actual change in the Attorney's role to date.

We understand that the Joint Committee on Human Rights is currently examining UK legislation relating to genocide, war crimes, and crimes against humanity. We seek your urgent attention to the amendments outlined in this letter, as well as careful examination of other legal reforms required to fully empower UK courts to exercise effective universal jurisdiction over these crimes.

Thank you for your time and attention to these important matters.

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#### **Memorandum submitted by John RWD Jones, Doughty Street Chambers**

English law in relation to international crimes is in need of amendment and rationalisation. It is currently a patchwork of norms, with little logical basis underlying which crimes are or are not subject to universal jurisdiction.

#### **TORTURE**

It is well-established that there is universal jurisdiction over the offence of torture and thus that a torturer may be prosecuted in the UK irrespective of his nationality or of where his crimes were committed.

Section 134 of the Criminal Justice Act (which implements the 1984 Convention against Torture) clearly sets out this provision:

- “(1) *A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.*
- (2) *A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—*
- (a) *in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—*
- (i) *of a public official; or*
- (ii) *of a person acting in an official capacity; and*
- (b) *the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.”*

This provision was used in the *Zardad* case to successfully prosecute an Afghan warlord for torture committed in Afghanistan.<sup>25</sup>

To achieve a prosecution for torture,

- a) It must be proved that the accused
  - i. intentionally;
  - ii. inflicted severe pain or suffering;
  - iii. at the instigation or with the consent or acquiescence of person acting in an official capacity.
- b) the consent of the Attorney-General is required (section 135, *Criminal Justice Act 1988*).

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<sup>25</sup> <http://news.bbc.co.uk/1/hi/uk/4693239.stm>.

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**HOSTAGE-TAKING**

It is well-established that there is universal jurisdiction over the offence of hostage-taking. The *Taking of Hostages Act 1982*, which implements the 1979 *International Convention against the Taking of Hostages* provides that the offence may be committed by a person irrespective of his or her nationality and irrespective of where the offence occurred:

- “(1) person, whatever his nationality, who, in the United Kingdom or elsewhere,—
- (a) detains any other person (“the hostage”), and
  - (b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage,
- commits an offence.

This provision was also used in the UK-based Zardad case to successfully prosecute the defendant for hostage-taking (s.2, *Taking of Hostages Act 1982*).

**WAR CRIMES**

In the UK, war crimes may be prosecuted under, broadly speaking, three categories of case.

*First category: grave breaches of the Geneva Conventions of 1949*

Universal jurisdiction over grave breaches is provided for under the *Geneva Conventions Act 1957, ss.1, 1A*:

“1. *Grave breaches of scheduled conventions*

- (1) *Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence.”*

The term “grave breach” is specifically defined in each of the four Geneva Conventions of 1949 and in Additional Protocol I. “Grave breaches” are certain acts (typically including: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial) committed against “protected persons” (defined precisely in each Convention—eg prisoners of war, civilians, the wounded and the shipwrecked) or “protected property”.

The *Geneva Conventions Act 1957* remains in force in the UK, notwithstanding the entry into force of the *International Criminal Court Act 2001* (the “ICC Act”).<sup>26</sup> The ICC Act only made slight amendments (see section 70) to the 1957 Act, relating to “where the trial shall be held, the need for Attorney General’s consent to prosecutions, and the sentence available on conviction” (*Explanatory Notes* to Section 70 of the ICC Act: Offences under section 1 of the Geneva Conventions Act 1957).

These amendments do not apply to offences committed before section 70 of the ICC Act came into force (01.09.2001). The grave breaches regime of the *Geneva Conventions Act 1957* still applies beyond 01.09.2001, only subject to the procedural modifications outlined in Section 70 of the ICC Act.

Given that the Geneva Conventions of 1949 apply only to international armed conflict, arguably the *Geneva Conventions Act 1957* does not provide for jurisdiction in England and Wales to prosecute crimes committed in an internal armed conflict eg Rwanda in 1994. Second category: war crimes involving homicide committed during WWII on what was at the time German territory where the accused is or has become a UK national or resident

The *War Crimes Act 1991* provides for prosecution thus:

“1 *Jurisdiction over certain war crimes*

- (1) *Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence—*
  - (a) *was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and*
  - (b) *constituted a violation of the laws and customs of war.*
- (2) *No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.*
- (3) *No proceedings shall by virtue of this section be brought in England and Wales or in Northern Ireland except by or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland. [...]*”

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<sup>26</sup> The majority of the International Criminal Court Act 2001 came into force on 1 September 2001.

This statute has been applied in two cases: *R. v. Sawoniuk*<sup>27</sup> and in the case of Simeon Serafanowicz.<sup>28</sup>

Third category: war crimes within the definition of article 8 of the ICC Statute are offences under section 51 of the *ICC Act 2001* provided that (i) the crimes were committed after 1 September 2001 — when the ICC Act entered into force—and (ii) the accused is a UK resident or national:

“51 *Genocide, crimes against humanity and war crimes*

- (1) *It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.*
- (2) *This section applies to acts committed—*
  - (a) *in England or Wales, or*
  - (b) *outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.”*

#### *War Crimes: Conclusion*

Clearly, a whole host of war crimes would escape prosecution in the UK, in particular war crimes committed in an internal armed conflict prior to September 2001, or after September 2001 but where the accused is not a UK national or resident.

In my opinion, the line between international and internal armed conflicts is becoming increasingly hard to maintain.

The argument has been made—notably by the United States government in an amicus curiae brief<sup>29</sup> submitted to the ICTY in the *Tadic* case—that the “grave breaches” regime of the Geneva Conventions of 1949 also applies to non-international armed conflicts, either by virtue of common article 3 of the Conventions, which applies to such conflicts, or by virtue of a norm whereby the Conventions themselves now apply, as a matter of customary international law, to internal as well as international armed conflicts. For an expression of the latter view, references should be made to the separate opinion of Judge Abi-Saab in the *Tadic* case:

*“As a matter of treaty interpretation [...] it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the “subsequent practice” and opinio juris of the States parties : a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of “grave breaches.” The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of “grave breaches” is extended to internal conflicts. But the first seems to me as the better approach .”*

Accordingly, it would make sense for English law to simply provide that all war crimes may be prosecuted in the UK: irrespective of

- (a) whether they are committed in an internal/international armed conflict,
- (b) when and where they were committed and
- (c) the nationality of the offender.

This could be achieved either by amending the 1957 Act so as to unequivocally to cover war crimes in an internal conflict or (my preferred approach) by building these provisions into a new consolidated *War Crimes, Crimes Against Humanity and Genocide* law.

#### CRIMES AGAINST HUMANITY

Crimes against humanity, considered among the most atrocious crimes known to man, constitute massive crimes against a civilian population, eg mass rapes and “ethnic cleansing”. They are defined in Article 7 of the ICC Statute as any of a list of acts eg murder, extermination, enslavement, deportation, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

Yet it is a curious accident of legal history that there has never been a Convention on Crimes against Humanity, as there are the Geneva and Hague Conventions on the laws of war and the 1948 *Genocide Convention*. Accordingly, in the UK, there has never been a Crimes against Humanity Act and no provision for prosecuting crimes against humanity in the UK until the advent of the *ICC Act 2001*.

Under English law currently, the prosecution of crimes against humanity is only possible if:

- (a) They were committed after 2001, by a UK national or resident—if committed outside the UK
- (b) They were committed in the UK

<sup>27</sup> [2000] Crim. L.R., pp505–509; see also E Steiner, *Prosecuting war criminals in England and France [1991] Crim. L.R.*, 180.

<sup>28</sup> See an article on this case by Nutting *et al*, *Med. Sci. Law* (1998), vol 38, no 3.

<sup>29</sup> “The ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character.” (U.S. Amicus Curiae Brief, at paragraph 35.)



It is contrary to common sense and a shared sense of humanity that, while torture or hostage taking may be prosecuted in the UK on a basis of truly universal jurisdiction, crimes against humanity committed prior to 2001 may not be.

#### GENOCIDE

Genocide is any of a specified set of crimes committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Many regard genocide as an aggravated form of crimes against humanity, ie committed with the aggravated intent to destroy the group.

Genocide is the subject of an international treaty, namely the Genocide Convention 1948. It does not provide for universal jurisdiction, but that “*persons charged with genocide [...] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*” Thus, when the UK enacted the *Genocide Convention Act 1969* (now repealed by the ICC Act 2001), it did not provide for universal jurisdiction.

With the advent of the *ICC Act 2001*, genocide may be prosecuted in the UK but only if:

- (a) The genocide occurred after 2002 and only if the accused is a UK national or resident.
- (b) The genocide occurred in the UK.

Thus Rwandan *genocidaires* living in the UK could not be prosecuted here for genocide committed in Rwanda in 1994.

#### CONCLUSION

For the foregoing reasons, in my opinion, English law on international crimes is unsatisfactory. It is patchy and full of anomalies. Accordingly, it is an area of law which is ripe for amendment.

I would advise that any new law on international crimes should have all of the following features:

- (1) It should define war crimes, crimes against humanity and genocide by reference to the ICC Statute, incorporating by reference and verbatim the definitions in Articles 6, 7 and 8, respectively, of the ICC Statute;
- (2) The law should make it an offence to commit any of those acts, wherever committed and irrespective of the nationality of the accused;
- (3) In order to best safeguard the principle of legality (*nullum crimen sine lege*), universal jurisdiction should exist with respect to genocide, crimes against humanity and war crimes as from the following dates:
  - (a) Genocide — only if the crime was committed after 27 March 1969, being the date upon which the UK’s *Genocide Act 1969* entered into force, giving effect to the *Genocide Convention 1948* in domestic law;
  - (b) Crimes against Humanity — only if the crime was committed after 1 January 1991, being the date from which the United Nations, through the adoption of the Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), recognised crimes against humanity as a crime which was “*beyond any doubt part of customary law*” (Secretary-General’s Report on the ICTY Statute, 3 May 1993 (S/25704), paragraph 34);
  - (c) War crimes — only if the crime was committed after 31 July 1957, being the date upon which the *Geneva Conventions Act 1957* entered into force, giving effect to the “grave breaches” provisions of the Geneva Conventions 1949 in domestic law
- (4) The maximum penalty provided for should be life imprisonment, in line with the seriousness of these offences;
- (5) The law should state that it does not affect the provisions for transferring cases to the ICC, but it would have to repeal the offence-creating sections in the ICC Act 2001;
- (6) The *Geneva Conventions Act 1957* and *War Crimes Act 1991* may need to be repealed in part, but a very careful examination of those acts would be needed to ensure that no lacuna is thereby created;
- (7) The Prosecution should require the consent of the Attorney-General;
- (8) The Prosecution should require that the accused person be physically present in the UK, rather than UK residents or nationals.

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## Memorandum submitted by Liberty

### INTRODUCTION

1. Liberty welcomes the opportunity to respond to the Joint Committee on Human Rights (JCHR) inquiry on UK legislation relating to genocide, torture and war crimes committed abroad and in relation to the Torture (Damages) Bill. There is something of a gap in UK law in relation to some of these crimes as a number of these offences cannot be prosecuted in the UK, despite the fact that under international law the UK has jurisdiction to prosecute. In particular, given the recent allegations and admissions of UK involvement in extraordinary rendition and torture it is timely that there be a review of the UK's laws in relation to torture. The Torture (Damages) Bill is an important proposal that seeks to provide a means by which persons tortured abroad can have access to a civil remedy—a long overdue measure and one which we hope the JCHR will support.

### INTERNATIONAL LEGAL FRAMEWORK

2. Customary international law gives States the power to assert criminal law jurisdiction over certain conduct, generally on the basis that the crime occurred on its territory; the crime was committed by or against one of the State's nationals; or the act threatened the State's interests. These are some of the grounds on which the UK has legislated to make it an offence to commit genocide, war crimes or crimes against humanity on UK territory or, outside of the UK, by a UK national.<sup>30</sup> The UK also has treaty obligations to criminalise certain conduct under its domestic law. So, for example, the Torture Convention requires the UK to legislate to make torture an offence and to either prosecute or extradite an alleged offender found in the UK.<sup>31</sup> On this basis the UK has legislated to implement the Genocide Convention<sup>32</sup> and the Geneva Conventions,<sup>33</sup> and to criminalise torture carried out by a public official.<sup>34</sup>

3. One other, and more controversial, basis for jurisdiction is “universal jurisdiction” which gives a State the power to criminalise certain conduct committed abroad. It is generally accepted that this power extends to the crime of piracy, slavery, war crimes, crimes against humanity, torture and genocide.<sup>35</sup> It is on this basis that the UK enacted the limited scope of the *War Crimes Act 1991* to enable murder charges to be brought against a person for war crimes committed in German occupied territory during World War II, irrespective of the person's nationality at the time the offences were committed (although they were required to be a UK citizen before they could be prosecuted).<sup>36</sup>

### INTERNATIONAL CRIMINAL COURT ACT 2001

4. The recent criminalisation of genocide, war crimes and crimes against humanity under the *International Criminal Court Act 2001* (ICCA), makes use of universal jurisdiction to a limited extent as it criminalises conduct committed abroad, despite the fact that at that time there was no link to the UK. However, it only enables that jurisdiction to be enforced once the person is resident in the UK.<sup>37</sup> One of the main drawbacks of this Act is the failure to define who a UK “resident” is. Does it have the same meaning as that found in immigration legislation, which requires a degree of permanency in the UK? Or should a different definition apply in the criminal context? It does seem clear that it could not apply in order to prosecute a person who was holidaying in the UK. The other problem with the ICCA is that it has no retrospective application, applying only from the date the Act came into force (September 2001). This is despite the fact that all of these offences have been criminal offences under international law from at least World War II. It is a fundamental principle of international criminal law and human rights law that no one can be found guilty of an offence if, at the time it was alleged to have been committed, it was not a criminal offence.<sup>38</sup> This is an extremely important principle which allows for legal certainty and protects people from unfair laws that criminalise conduct retrospectively. However, it was established by the Military Tribunals in Nuremberg and Tokyo that certain crimes, have long been criminalised by international law. In subsequent

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<sup>30</sup> See the International Criminal Court Act 2001, section 51.

<sup>31</sup> See article 4 and 5(2) of the Convention Against Torture and Inhuman or Degrading Treatment or Punishment, 1984.

<sup>32</sup> See the Genocide Act 1969, making the act of genocide a criminal offence. This Act was later repealed and replaced by the International Criminal Court Act 2001.

<sup>33</sup> See the Geneva Conventions Act 1957.

<sup>34</sup> See section 134 of the Criminal Justice Act 1988.

<sup>35</sup> See *Tadic*, IT-94-1, Appeals Chambers, International Court for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at [62], and Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), ICJ Rep 2002, per Judge Koroma at [9], Judges Higgins, Kooijmans and Buergenthal at [59]-[65] and Judge Van den Wyngaert at [59]. See also Roger O'Keefe, “Universal Jurisdiction: Clarifying the Basic Concept” (2004) 2 *Journal of International Criminal Justice* 735.

<sup>36</sup> The reference to nationality was not necessary as a matter of international law. The power to enact this legislation must be based on universal jurisdiction as subsequent acquisition of nationality cannot confer jurisdiction under the nationality principle—if it did this would fall foul of the rule against non-retroactivity, see Roger O'Keefe, “Universal Jurisdiction: Clarifying the Basic Concept” (2004) 2 *Journal of International Criminal Justice* 735.

<sup>37</sup> See section 68 of the ICCA.

<sup>38</sup> See article 7(1) of the European Convention of Human Rights and article 15(1) of the International Covenant on Civil and Political Rights.

international treaties and decisions it has been established that prosecution for a crime under customary international law does not require the country prosecuting the person to have criminalised such conduct at the time when it was allegedly committed. Therefore, the principle of non-retroactivity under human rights law does not preclude the trial and punishment of a person for an act which, at the time it was committed, was criminal under international law, such as war crimes, genocide, and crimes against humanity.<sup>39</sup> The decision not to make the ICCA crimes retroactive means that a person accused of an offence committed before 2001 can only be prosecuted in the UK if it was a crime under other legislation at that time. So for example, while the *Geneva Conventions Act 1957* criminalises certain grave breaches of the Geneva Conventions and Additional Protocol I to the Conventions, it does not criminalise conduct under Additional Protocol II, which applies to internal armed conflicts. Thus there is a gap in the law in relation to those accused of crimes that took place during an internal armed conflict before 2001. This means, for example, that four Rwandans accused of war crimes and torture during the Rwandan genocide are waiting to be extradited to Rwanda rather than prosecuted in the UK. In addition, it may be that the *Genocide Convention Act 1969* does not apply to those with state immunity, given that it did not incorporate article IV of the *Genocide Convention 1948* which precludes the application of state immunity.<sup>40</sup> Liberty believes that this gap in the law needs to be remedied. As is recognised under the ECHR, certain grave offences do not need the protection of non-retroactivity, as they are by their very nature so obviously criminal.

#### SECTION 134 OF THE CRIMINAL JUSTICE ACT 1988: TORTURE

5. Liberty also has concerns about the current wording of section 134 of the *Criminal Justice Act 1988*, which criminalises torture by public officials. While torture by public officials is made criminal in the first instance, the provision includes a defence if the accused can prove that he or she had “lawful authority, justification or excuse” for their conduct. This is defined to mean authority under the law of the UK or, in certain circumstances, the law of the country in which the pain or suffering was inflicted. A UK law that authorised torture could never be lawful so it is very unlikely that this could ever be used as a defence for torture, although there may be room for some doubt in relation to the laws of another country. This provision should be redrafted to align it more closely with the provision in the Torture Convention which provides that the prohibition does not apply to pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>41</sup>

#### INVESTIGATION AND PROSECUTION OF OFFENCES

6. As already stated, the current legal framework has a number of gaps in it which could result in perpetrators of some of the most heinous offences not being brought to justice in the UK. Non UK citizens or residents, however defined, are not covered by the ICCA and even in relation to citizens/residents, if the crimes were committed before 2001 the offenders may not be able to be prosecuted. The only alternative in such situations is to extradite suspects to an appropriate country to face trial, but this depends on another country seeking their extradition and showing that fair trial standards can be met.<sup>42</sup> In very rare cases such a person may be surrendered to the International Criminal Court (ICC). However, the ICC suffers from the same problem that it has no retroactivity and there are a number of other procedural and legal hurdles that mean this option will not generally be available. In the absence of applicable alternatives persons who are suspected of committing heinous offences may well be able to continue to holiday or reside in the UK. The government should look to amend the law to close the gaps and not wait until a situation arises where it is unable to prosecute or extradite suspected war criminals or torturers.

7. While it is important to close this gap in the law, the current issue of most concern in this area is the adequacy of UK law in respect of domestic prosecutions for crimes of torture. The UK government has, after initially and consistently denying it, admitted UK territory has been used for flights illegally transporting detainees to locations where they faced torture and inhuman and degrading treatment.<sup>43</sup> It has also now admitted to having handed over detainees within the UK’s jurisdiction to US officials who were

<sup>39</sup> See article 7(2) of the European Convention of Human Rights and article 15(2) of the International Covenant on Civil and Political Rights.

<sup>40</sup> See Lord Bingham’s decision in *Pinochet v Evans* (Metropolitan Stipendiary Magistrate); *Ex parte Pinochet* [1998] EWHC Admin 1013 (28 October, 1998). Note the question about the application of the Genocide Convention was not pressed on appeal to the House of Lords.

<sup>41</sup> Article 1(1) of the Torture Convention.

<sup>42</sup> Following the enactment of the Extradition Act 2003, current extradition arrangements for extradition from the UK leave much to be desired. Liberty believes that the decision about the country in which a person should be tried should be informed by human rights considerations to recognise the serious impact which extradition has on those concerned and their families. We believe that before a person is extradited to any country (including another EU country) a basic case should be demonstrated by the requesting country and considered in UK courts; a person should not be extradited where it would not be in the interests of justice to do so, and where extradition would constitute a disproportionate interference with the individual’s human rights. The following factors would indicate whether extradition would be disproportionate or contrary to the interests of justice: (i) where the individual lives; (ii) where the offence was committed; (iii) where the victims are; and (iv) where the evidence is located.

<sup>43</sup> See the statement by Foreign Minister David Miliband in the House of Commons on 21 February 2008 about the use of airfields on Diego Garcia.

then unlawfully rendered to Afghanistan where torture routinely takes place.<sup>44</sup> The government has also sought to suppress information regarding involvement of UK and US authorities in extraordinary rendition and torture.<sup>45</sup> This led to the High Court rule that an earlier redacted judgment containing details regarding the action of UK and US officials could not be made public despite “*the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the [information] public*”. Most worryingly, evidence has recently come to light that implicates UK officials in providing intelligence to the US that has been used in interrogating detainees alongside torture. The High Court in 2008<sup>46</sup> found that the UK Security Services facilitated interviews by or on behalf of the United States when Mr Binyam Mohamed was being detained by the United States incommunicado and without access to a lawyer, and continued to do so in the knowledge of what had been reported to them in relation to the conditions of his detention and treatment. The court found that “*the relationship of the United Kingdom Government to the United States authorities in connection with BM was far beyond that of a bystander or witness to the alleged wrongdoing*”.<sup>47</sup> In October last year the government stated it had referred this matter to the Attorney-General to investigate whether it should be referred to the police for a criminal investigation. After a five month delay in which the Attorney-General considered this matter this has finally been referred to the police for investigation. Given there was already an allegation of a criminal offence (of torture) these allegations should have been, in the first instance, investigated by the police.

8. It is clear that there are many questions that need to be answered in relation to the UK’s involvement in extraordinary rendition and possible complicity or encouragement in torture. This can only be done by a full independent and public inquiry that can properly examine these issues in the public interest and as part of the UK’s obligations under the Convention Against Torture. It is likely that there will need to be criminal investigations into official involvement, using section 134 of the *Criminal Justice Act 1984*. This makes it an offence to intentionally inflict severe pain or suffering on another in the performance or purported performance of his or her official duties, including whether it was caused by an act or an omission. It seems clear that the mere presence of intelligence personnel at an interview with a person who is being held incommunicado and in conditions where torture is likely, implicitly condones the torture, and the interrogation of such a person, or indeed the mere failure to try to prevent it, may well constitute an offence under section 134. However, a potential obstacle to justice in these circumstances is contained in section 7 of the *Intelligence Services Act 1994* (ISA) which provides that if a person who would otherwise be criminally or civilly liable for an act done outside the British Islands, can obtain immunity if the act was authorised by the Secretary of State. There is no limitation on what the Secretary of State can authorise, although his or her duties under the *Human Rights Act 1998* should mean that any authorisation given that is contrary to the HRA would be unlawful. Despite the application of the HRA the ISA should be amended to make it clear on the face of it that it cannot be used to excuse any acts of torture, or indeed questioning or provision of questions in circumstances where a UK official knew, or ought to have known, that the detainee faced a real risk of torture or other unlawful treatment.

#### TORTURE (DAMAGES) BILL

9. The Torture (Damages) Bill seeks to remedy the current gap in the law whereby victims of torture which was committed abroad are often unable to seek any compensation for their trauma. This was epitomised in the case of *Jones v Saudi Arabia*,<sup>48</sup> where the House of Lords held that civil actions could not proceed against officials of the government of Saudi Arabia for torture because of the principle of state immunity. Despite torture being a crime under international law, state immunity (and potentially personal head-of-state immunity) precludes any chance of compensation in many instances. This Bill seeks to amend the *State Immunity Act 1978* to provide that a state will not be immune from proceedings issued against state officials in respect of torture. It also extends the limitation period for a claim in respect of torture to six years, in recognition of the fact that it may take some time for a traumatised victim of torture to be able to gather the strength and resources to seek compensation for their suffering. Liberty wholly supports this Bill as it is an important step forward in recognising the rights and needs of torture victims and the essential nature of the prohibition against torture. State immunity should not attach to violations as grave as torture. The rationale for state immunity is based on state sovereignty, but given the absolute prohibition against torture, nationally and internationally, immunity should no longer be accepted. We hope that the JCHR will also lend its support to this Bill and help put pressure on parliamentarians to enact this Bill as law.

March 2009

<sup>44</sup> See the admission by Defence Secretary John Hutton in the House of Commons on 26 February 2009.

<sup>45</sup> See *R (on application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), 4 February 2009 at [54].

<sup>46</sup> In *R (on application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048.

<sup>47</sup> *Ibid* at [88]. See also the cases of Mr Bisher Al-Rawi and Jamil El-Banna in which it is alleged that UK authorities actually provided information to US and Gambian authorities that directly led to their arrest and later extraordinary rendition to Afghanistan where they were tortured, and then to Guantanamo Bay: see Amnesty International report, *State of Denial: Europe’s Role in Rendition and Secret Detention*, June 2008, pages 71–73, available at: <http://www.amnesty.org/en/library/info/EUR01/003/2008/en>

<sup>48</sup> [2006] UKHL 26; [2007] 1 AC 270.

### Memorandum submitted Ken Macdonald QC

As I describe below, UK legislation relating to genocide, torture and related offences is illogical and contains gaps.

(i) *After September 1 2001 (the date on which the International Criminal Court Act (ICCA) came into force)*

For offences committed after September 2001, the UK has jurisdiction under the ICCA to prosecute UK nationals and residents for genocide, war crimes, and crimes against humanity, wherever they were committed.

In respect of war crimes, this includes crimes committed in international and internal armed conflicts. This clarification is important. Jurisdiction to prosecute war crimes under the ICCA is broader than for war crimes committed prior to 2001.

For offences committed after September 2001, the UK also has jurisdiction to prosecute grave breaches of the Geneva Conventions and First Additional Protocol under the Geneva Conventions Act 1957; hostage-taking under the Taking of Hostages Act 1982; and torture under the Criminal Justice Act 1988. Grave breaches of the Geneva Conventions and First Additional Protocol, simply stated, equate to war crimes committed in international armed conflicts, but not internal armed conflicts.

For all three crimes (grave breaches, hostage taking and torture) the UK has fully universal jurisdiction, wider therefore than jurisdiction under the ICCA. In plain English this means that, evidence permitting, we could prosecute a perpetrator of any nationality, residing anywhere in the world, for one of the above three crimes committed anywhere in the world.

There are therefore two bases of jurisdiction to prosecute international crimes post September 2001. Extra-territorial for genocide, all war crimes and crimes against humanity committed by UK residents and nationals under the ICCA; and fully universal for war crimes committed in international armed conflicts (grave breaches), hostage-taking and torture under the Acts I've mentioned.

(ii) *Before September 2001*

For acts committed prior to September 2001 the picture is as I have just described, but as if the ICCA had not been enacted.

Accordingly the UK has jurisdiction to prosecute any national for war crimes committed in international armed conflicts, for hostage-taking and for torture on the basis of universal jurisdiction. Jurisdiction for these crimes dates from 1957 for grave breaches of the Geneva Conventions, 1982 for hostage-taking, and 1988 for torture. Beyond this, two additional Acts are relevant.

- Under the 1991 *War Crimes Act*, the UK also has jurisdiction to prosecute UK residents and nationals for murder and manslaughter as part of war crimes committed in Nazi occupied Europe during the Second World War.
- The 1969 Genocide Act, which, however, does not provide for extra-territorial or universal jurisdiction. The Genocide Act was repealed after the passage of the ICCA.

#### RWANDAN GENOCIDE SUSPECTS IN THE UK

The UK is currently seeking to extradite four category one suspected *génocidaires* resident in the UK for trial in Rwanda, following a request from the Rwandan government. The request has been granted by the magistrates' court and by the Home Secretary. The appeal against the decision of the magistrates' court was heard in the High Court in December and is awaiting judgment.

As part of the extradition process, the CPS considered whether it would have jurisdiction to prosecute the four fugitives should extradition fail. This type of review is consistent with the obligation on States to either extradite or prosecute perpetrators of certain international crimes. We concluded that:

- (a) The allegations against them fell within the legal definitions of genocide and/or war crimes.
- (b) The genocide in Rwanda should be classified as an internal armed conflict under international humanitarian law. This was consistent with the classification made by several international organs.
- (c) Therefore, as a result, we had no statutory jurisdiction to prosecute them for either genocide, the acts being committed outside the UK; or war crimes, the conflict not being international in nature.

Clearly this finding has an impact that goes beyond these four fugitives. It starkly highlights an important jurisdictional gap: the UK has no jurisdiction to prosecute pre September 2001 acts of genocide committed outside the UK, nor any pre September 2001 war crimes committed in internal armed conflicts.

The latter would exclude internal conflicts such as in Rwanda and Sri Lanka, but not, for example, the Bosnian war, which is classified by the ICTY as an international conflict. In my opinion this does not make sense.

Two questions arise. Firstly, is the jurisdictional gap a result of the UK failing to implement an international obligation? And secondly, is the jurisdictional gap in question necessarily an impunity gap?

*Is the jurisdictional gap a result of the UK failing to implement an international obligation?* In terms of International Treaty Law, the short answer is no. When the Genocide Convention was negotiated, States were unable to agree whether genocide should be a crime of universal jurisdiction.

The UK does not have jurisdiction to prosecute war crimes committed in an internal armed conflict prior to 2001 for similar reasons. In the negotiations in 1977, States Parties to the Geneva Conventions were unable to agree to make the grave breaches provisions of the Geneva Conventions and First Additional Protocol applicable to internal armed conflicts as set out in the Second Additional Protocol.

So the jurisdictional gap arises because there was no international obligation on the UK to incorporate these offences into domestic law. The arguments in favour of legislation to close loopholes in UK law in this area will necessarily revolve around the status of customary international law, rather than treaty law, at the time of, say, the Rwandan genocide, or the civil war in Sri Lanka prior to 2001.

*Is the jurisdictional gap an impunity gap?* In my view it is. It is illogical that torturers who committed their crimes in 1990s can be tried here but not *génocidaires*. These distinctions lack moral logic.

The most important alternatives to domestic prosecution are extradition, transfer to an international court, or immigration action. But, where deportation or extradition cannot take place, we should not countenance the UK being a safe haven for people suspected of quite unspeakable crimes, like those which took place in Rwanda. This question may need to be urgently addressed in the light of the High Court's decision in the Rwandan case, expected at any moment.

We also need to accept that the scale of this problem is not small. Over the last four years, hundreds of people have been screened each year by the Border Agency for suspected involvement in war crimes, crimes against humanity and genocide.

#### REFORMING UK LAW ON INTERNATIONAL CRIMES

I would make two recommendations to strengthen UK law on genocide, war crimes and crimes against humanity:

1. Removing and the residency requirement in the ICCA and replacing it with something nearer to a "presence" requirement. This would bring the UK closer into line with other common law countries such as Australia, New Zealand, Canada and South Africa. It would also bring us into line with the United States position on genocide. The current residency requirement presents difficulties for the CPS and the definition lacks certainty.
2. Retrospective application of jurisdiction over genocide, war crimes and crimes against humanity before 2001: New Zealand has retrospectively applied jurisdiction over crimes against humanity to cover crimes committed in the 1990s. In the UK jurisdiction was retrospectively applied by the 1991 *War Crimes Act* for murder, manslaughter and culpable homicide committed in Nazi-occupied Europe that *constituted a violation of the laws and customs of war*. Such retrospective application of jurisdiction is expressly permitted in human rights law.

#### THE CHARGING PROCEDURE AND PRACTICAL IMPLICATIONS OF PROSECUTING INTERNATIONAL CRIME ON THE BASIS OF EXTRA-TERRITORIAL JURISDICTION

##### (i) Procedure

For the CPS, prosecuting international crimes is not a question of will. When evidence is passed to the CPS by investigators it is reviewed in strict accordance with the two stages of the Code test. If there is enough evidence to provide a realistic prospect of conviction, the public interest in prosecuting will be considered.

The evidential test remains the same however grave the crime. If it is not passed there will be no prosecution. This is an absolute article of faith and the CPS does not deviate from this principle under any circumstances. Indeed to do so would be unlawful.

Paragraph 5.9 of the Code sets out the public interest factors which would favour a prosecution. It is highly likely that a prosecution for an international crime would meet the public interest test. The Attorney-General will then be asked for her consent to prosecution.

##### (ii) Practice

Prosecuting international crime extra-territorially is unavoidably a question of human and financial resources. Investigators and lawyers have to spend time abroad reviewing evidence and overseeing mutual legal assistance requests. This was the case for the prosecution of the Afghan warlord Zhardad for grave offences of torture. Witnesses will have to be brought to trial from abroad, with the risk that they will claim asylum. Again, this was the case in *Zhardad*. Effective international cooperation at all levels will be pivotal to the success of the trial.

Mr Zhardad, of course, was sentenced to a term of 20 years imprisonment in 2005.

Law reform in this area will likely only be effective if it is accompanied by the establishment of a specialised War Crimes Unit, appropriately resourced to investigate such crimes. These already exist in Canada, the Netherlands, and Scandinavian countries. These are models we could perhaps learn from.

9 March 2009

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### **Memorandum submitted by the Medical Foundation for the Care of Victims of Torture**

The Medical Foundation for the Care of Victims of Torture (the Medical Foundation) is one of the largest torture treatment centres in the world, and the only human rights organisation in the UK dedicated solely to the treatment and rehabilitation of survivors of torture and organised violence. It offers medical consultation, examination and forensic documentation of injuries, psychological treatment and support, and practical assistance to torture survivors. Its clinical services include psychiatry, clinical psychology, counselling, individual and group psychotherapy, physiotherapy and specialist child and family therapies. Since its inception in 1985, some 45,000 people have been referred to the Medical Foundation for help.

In addition to its clinical work, the Medical Foundation seeks to raise awareness of torture. Its substantial archive of reports documents the systematic use of torture and the consequences for those who survive.

Accountability for torture is a key component in torture prevention, and it is therefore essential that survivors of torture, or the families of those who were tortured and have now died, are able to obtain justice in respect of the abuses they or their loved ones have suffered.

The Medical Foundation therefore supports the introduction of the Torture Damages Bill for the following reasons:

#### **THE EFFECTS OF TORTURE**

Torture impacts on the individual and beyond, to their family, community and society.

At an individual level, psychological consequences of torture include a loss of bodily or psychosocial control, typically leading to a profound sense of helplessness and powerlessness, a loss of trust, isolation (including complete withdrawal from or diminished communications, which in turn impacts on the ability to form or maintain personal relationships—including within marriage, with children and within the community more widely), grief at the loss not only of others but also of the self, a sense of guilt, shame or humiliation, anxiety, depression (which can include suicidal leanings), intrusive phenomena such as hearing voices, flashbacks and nightmares, difficulties in recollection, emotional numbness and avoidance of any place or situation which might trigger memories of their torture.

At a physical level, consequences of torture can include injuries, illness, disability, chronic pain and the contraction of life-threatening diseases as a result of torture, such as HIV–AIDS.

Torture and its clinical consequences can lead to an inability to function in everyday life, including the inability of a survivor to work and meet their own or their family's economic needs, to participate in family life or social networks, to fulfil daily roles and activities such as cooking for themselves, or to undertake roles as parents in looking after children. This loss of function can therefore affect livelihood, self-esteem and the individual's relationships. The consequent isolation this engenders can be exacerbated by rejection in some cases by family, friends and community as a result of disclosure of abuse, particularly in the case of sexual torture.

Finally, torture attacks one's core identity and integrity and produces a profound loss of meaning in life. As one of our clients put it:

“Who am I? What am I? Not a man, not a husband, not an animal, but not human—I am zero. I am already dead, life has no meaning, what is the point of living”.

In addition to the personal impact of torture, family members may experience harassment, intimidation and deep distress as a result of the torture, including unresolved grief in cases where the victim's body is never found. Families can also experience strain in caring for the victim or their dependants.

The potential impact of torture on adults and minors can be long-term, and for some, in addition to past suffering and damage, the losses of future potential are permanent due, for example, to disability, illness or severe psychological distress or inability to form relationships or inability to conceive as a result of torture. In the case of a child, healthy emotional development can be severely affected by torture, sometimes leading to enduring psychological difficulties in adulthood.

The various consequences of torture require recourse to a broad array of healthcare services, including psychiatry, clinical psychology, psychotherapy, counselling, individual, family and group work, physiotherapy and other physical therapies.

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## THE BENEFITS OF JUSTICE

Many clients of the Medical Foundation fled their countries after experiencing torture precisely because of their attempts to expose the injustices perpetrated by oppressive regimes and to hold them to account. For them, any avenues to seek reparation abroad could provide recourse to justice they were denied at home. By contrast, denial of reparation can be experienced by many as a double injustice.

Psychologically, justice and reparation can play a significant role in the recovery process of torture survivors. The potential benefits of justice can be threefold:

- (i) The prospect of redress—For many torture survivors it is essential to know that they have a choice—the possibility to seek justice and reparation. The availability of accessible mechanisms itself can be experienced as acknowledgement and commitment by the State to uphold the right to reparation.
- (ii) The process of seeking redress *per se* can be therapeutic. The process can afford the victim control in initiating the complaint, taking responsibility in directing the strategy of the procedure and seeing the perpetrator as a defendant having to answer for their actions.
- (iii) Obtaining justice—holding perpetrators accountable can enable not only access to other reparation measures, but also challenges impunity. Compensation can provide victims of torture public acknowledgement of their survival, facilitating the re-establishment of their dignity, self-esteem, trust in others and belief in the world as just. For some, money can also alleviate poverty and help those suffering hardship, disability and impaired functioning as a result of the violation.

A public and official recognition of harm done and the condemnation of perpetrators contribute to a sense that events are unmasked, the truth is told and a legacy of the past is acknowledged and remembered. This is particularly important to survivors who experience torture as secretive, their pain and suffering as invisible or hidden—something no one can bear to listen to, no one wants to believe and something the world turns a blind eye to.

The value of justice is summed up by one of our clients:

“It would mean that they did not win, they did not destroy me, they will be the ones who have to answer—so the world will know what they did—we are human beings, not ants that can be crushed like we are nothing...”

## WHY WE NEED THIS LAW

International law requires States to provide justice, reparation and rehabilitation in respect of acts of torture for which they are responsible, producing a corresponding right to a remedy. This remedy is recognised in regional and international Human Rights<sup>49</sup> and Humanitarian Conventions.<sup>50</sup> The right is reflected in International Criminal Law instruments, such as the Statute of the International Criminal Court<sup>51</sup> and the Rules of Procedure and Evidence for the International Criminal Tribunals for both Rwanda<sup>52</sup> and the Former Yugoslavia.<sup>53</sup> It is provided for in Article 14 of the UN Convention Against Torture, and reiterated in the codifying provisions of the UN Basic Principles and Guidelines on the Right to a Remedy (2005).

Despite this, access to justice can be problematic or illusory. The Medical Foundation’s clients are very often unable to seek redress in their own countries for a number of reasons. In many cases, those responsible for investigating allegations of torture are also the abusers, with the prospect not only that the complaint will not be properly investigated, but also that the individual will experience further abuse as a result of making the complaint.

In many cases the country’s judiciary does not enjoy independence from the Executive or is subject to interference or abuse from law enforcement or security personnel. In addition, the country’s legal system may lack the appropriate remedies and mechanisms to ensure the proper functioning of an action, or is otherwise unable to guarantee the safety of those bringing the action. Physicians operating in detention facilities and charged with recording injuries may not be able to act freely and independently, with the result

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<sup>49</sup> See for example Article 2(3)(a) of the International Covenant on Civil and Political Rights (1966), which requires State Parties “To ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” In addition, the right to a remedy in respect of both general and specific breaches of Human Rights Conventions can be found in: the International Covenant on Civil and Political Rights (art 9(5) and 14(6)), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child (art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art. 14); the Inter-American Convention on Human Rights (arts 68 and 63(1)), the African Charter on Human and Peoples’ Rights (art. 21(2)).

<sup>50</sup> The Geneva Conventions (1949) require signatory States to effectively investigate and prosecute allegations of grave breaches. See Articles 49 & 50 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Articles 50 & 51 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Articles 129 & 130 of the Convention Relative to the Treatment of Prisoners of War; Articles 146 & 147 of the Convention Relative to the Protection of Civilian Persons in Times of War. The 1977 Additional Protocol I expressly provides for the payment of compensation to victims of abuses.

<sup>51</sup> Article 75.

<sup>52</sup> U.N. Doc. ITR/3/REV.1 (1995), adopted 29 June, 1995; Rule 106.

<sup>53</sup> U.N. Doc IT/32/Rev.40, adopted 11 February 1994, Rule 106.



that physical evidence of torture will not be forthcoming. In many other cases still, torture survivors have fled their country in order to protect their own lives, and so are simply not in a position to make a complaint to the appropriate authorities even where such a complaint would be properly investigated.

In the words of one of our clients:

“You don’t know what it is like in my country—justice? [laughs]. This means nothing when there is a corrupt government, no law, police are criminals, there is nowhere safe—who do you go to? You have to just run.”

Access to justice through regional and international judicial bodies can also be difficult for many survivors of torture.

The remit of the International Criminal Court in respect of torture is limited to conflict-type scenarios, encompassing war crimes, where a grave breach of the Geneva Conventions must be shown to have taken place, or a crime against humanity, involving a “widespread or systematic attack directed against any civilian population”. As a result, many Medical Foundation clients who have suffered torture in detention at the hands of a repressive regime will never have recourse to this or similar criminal tribunals established at the international level. Even where a torture survivor’s claim falls within the Court’s remit, prosecutorial investigations tend to be aimed at leaders rather than individual, low-level perpetrators, with the effect that many torturers will remain unaccountable for their actions. Finally, criminal processes are aimed at the success of the prosecution, and although some models facilitate a degree of victim participation, the process itself is not victim-centred. As a result, many torture survivors will be left feeling sidelined or “used” by a process that did not fulfil their hopes or sense of justice.

In addition, although regional human rights Courts are able to hear actions for torture, such bodies are of limited capacity, issue awards of damages which may be nominal only, and permit actions only against signatory States, not specific perpetrators.

Finally, the right of an individual to make a complaint to international human rights treaty bodies such as the UN Committee Against Torture, the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination is dependent on whether the State itself has agreed that the respective treaty bodies can consider complaints relating to the treatment of an individual. While the treaty bodies are an important element of the international human rights system, even where the State has accepted the right of individual petition, such bodies are unable to impose a tangible or enforceable penalty over and above public sanction.

#### CONCLUDING COMMENTS

Civil action for damages is one aspect of reparative remedies which States can provide to survivors of torture or their families. It is not for everyone. For a vast majority of our clients their health, severe trauma and vulnerability following torture prevent them from considering or seeking-out avenues of complaint. Many are struggling to survive—just to regain a sense of self and dignity. A small minority, at certain stages in their recovery, may be emotionally robust enough to consider seeking redress, but most fear further emotional setbacks by having to relive their memories and going through legal procedures. For those clients who may consider seeking redress, many fear further reprisals and remain intensely preoccupied with the lack of safety for themselves and family members, many of whom remain in the country of origin and have endured harassment, torture and ill-treatment because the client has fled.

For those survivors of torture who want to and are able to pursue an action, however, the enactment of the Torture Damages Bill would be of enormous value in recognising and upholding the inherent dignity and humanity of the individual, whilst at the same time sending out a strong message that torture is wrong and that torturers cannot act with impunity.

It is therefore vital in the fight for accountability that the international framework be supplemented by domestic legislation such as the Torture Damages Bill, and that survivors of torture be able to bring an action for redress in the UK where justice in their country of origin is not accessible or achievable.

*March 2009*

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### Memorandum submitted by the Ministry of Justice

#### OFFENCES OF GENOCIDE, TORTURE AND RELATED OFFENCES

1. This note responds to the request from the Joint Committee on Human Rights about UK legislation on genocide, torture and related offences. It also deals with points made by Ken Macdonald on the same subject. Finally it deals with the Private Members Bill dealing with damages for torture which occurs abroad.

2. Attached is a note recently sent to the Justice Committee about the offences of war crimes, crimes against humanity and genocide. That note covered the position of genocide suspects from Rwanda and responded to calls for the offences in the International Criminal Court Act to be made retrospective, and

calls that the offences should apply to anyone present in the UK. The accompanying table sets out the geographical and time limits of the relevant offences. The more specific questions asked by the Joint Committee are addressed below.

#### PROSECUTIONS

3. The Committee asked for details of prosecution under a number of Acts, and their outcomes. The Genocide Act 1969 only covered Acts within the UK. It was repealed in 2001. There is no record of any prosecutions for Genocide under the International Criminal Court Act since then. Nor do we have any record of prosecutions under the Geneva Conventions Act 1957. Offences under the International Criminal Court Act 2001 are not recorded separately, so we are not able to give details of any cases under those Acts, or their outcomes.

4. There has been one prosecution for torture under section 134 of the Criminal Justice Act 1988, for acts of torture committed abroad. This concluded in July 2005, with the conviction and imprisonment of a former Afghan warlord, Faryadi Sarwar Zardad. He was sentenced to 20 years imprisonment. It is believed that this was the first time anywhere in the world that a foreign national has been tried on charges relating to torture which took place abroad and of victims who were also foreign nationals.

5. Prosecution policy is a matter for the Crown Prosecution Service. In deciding whether to prosecute individual cases, the CPS apply the two stage test set out in the Code for Crown Prosecutors. Under the Code a prosecution will take place where there is sufficient evidence to provide a reasonable prospect of conviction, and where a prosecution is in the public interest. However, cases of war crimes can present particular difficulties, particularly if the events took place a long time ago and/or in a foreign country. Records may be untraceable, destroyed or unreliable, particularly if the events took place during armed conflict. Witnesses may be untraceable, or unwilling to come forward, particularly if the events took place overseas. Both evidence and witnesses may be overseas, and access to them may depend on the co-operation of local governments and other organisations. There may often be language barriers to be overcome. And in some cases, even the identity of the suspect may be in doubt, because they may have deliberately or necessarily during a conflict adopted different identities, or a range of identities. Given these practical difficulties, it is unlikely that there will ever be large numbers of prosecutions for such offences committed abroad.

#### ESTIMATED NUMBER OF SUSPECTS

6. We do not have comprehensive figures which would allow us accurately to estimate the number of suspected perpetrators of war crimes, genocide or crimes against humanity who may be present in the UK. We know that between 2004 and October 2008, cases considered by the UK Border Agency War Crimes Team have resulted in 138 adverse immigration decisions. This will include decisions to refuse entry, indefinite leave to remain and naturalisation, and exclusions from refugee protection. These individuals may therefore no longer be in the UK. In that period 22 cases have been referred by the Team to the Metropolitan Police. These figures have not been provided under national statistics protocols, and have been derived from local management information. They are therefore provisional and subject to change. These are the best figures available. Although the figures provide some indication of the numbers of people who may have been involved in war crimes, we cannot necessarily extrapolate from them to give a broader estimate of the numbers of suspects present in the UK.

7. As to the number of suspects who are present in the UK, but cannot be prosecuted because of the date the crimes occurred, we do not collect such information. We know of four suspects who are appealing against a decision to extradite them to Rwanda. The Counter-terrorism division of the CPS had the benefit of reviewing an African Rights report and some evidence from the International Criminal Tribunal for Rwanda, containing allegations against one of the four suspects. It concluded that there was no realistic prospect of asserting jurisdiction in a UK court over genocide and/or war crimes committed in Rwanda in 1994. The CPS also considered whether it could bring a prosecution for the offence of torture, over which UK courts have universal jurisdiction. It concluded on the basis of information available that there was not a realistic prospect of a conviction. That conclusion is in respect of the particular circumstances of that case, and may not apply by extrapolation to other cases.

8. We do not know of any individuals against whom there is a prima facie case to answer for war crimes, genocide or crimes against humanity, but who have not been able to be prosecuted because they are not resident in the UK. It is very unlikely such a case would occur. (See paragraphs 12 and 13 below).

#### RATIONALE FOR DIFFERENT REGIMES

9. Ken Macdonald argues that the different regimes for different offences in this area are inconsistent and lead to injustices. He mentions offences of torture and hostage taking, where the UK law allows universal jurisdiction, in comparison with offences of genocide, war crimes and crimes against humanity under the International Criminal Court Act 2001, where jurisdiction is confined to UK nationals and UK residents. War crimes in an international armed conflict, and in some circumstances in armed conflicts not of an international character, are covered by the Geneva Conventions Act 1957 and the UK has universal jurisdiction over those crimes.

10. Any exercise of universal jurisdiction carries with it the risk of infringing the sovereignty of another State, and it is not something that the UK does lightly. In general, we would only do so when required to by an international convention or agreement, where the international community as a whole has agreed that the crimes are such as to warrant, and even require, universal jurisdiction. They do so ordinarily in order to give effect to an “extradite or prosecute” obligation. There are such conventions covering torture and hostage taking, and the UK has signed and ratified them. We therefore have legislation which enables us to fulfil our international obligations. There is no such requirement or agreement covering war crimes, genocide or crimes against humanity.

11. In the case of war crimes, genocide and crimes against humanity, these offences are also triable by the International Criminal Court, where the international community rather than the UK can see justice done. The 2001 Act also made these crimes extraditable. Although it is only possible for the court to deal with the most serious cases, where the acts in question occurred after 1 September 2001, other cases should, in the interests of justice, be dealt with in the country where the offence or offences took place. We therefore believe it is more important that we help to build up the capacity of those countries to deal with cases effectively, than that we take jurisdiction over crimes in which the UK may have no direct involvement.

12. Offences of war crimes, genocide and crimes against humanity can be prosecuted wherever they were committed. But Parliament agreed to restrict the offences to UK nationals and UK residents. The term “resident” is flexible. It would not cover, for example, short-term visitors or students. But it is for practical reasons unlikely that we would be able to mount a successful prosecution in a short time against someone who is here temporarily. Such a person should stand trial in the country where their offence took place, or their country of permanent residence if that is different. This is because it is important that justice is seen to be done locally, and because local justice is less likely to encounter the practical problems detailed in paragraph 5.

13. If a person is here for a longer period, they may become resident and be able to stand trial here for their crimes. We have no evidence that the term “resident” as opposed to “present” represents any practical gap in UK law. The UK Government takes seriously its international obligations to ensure that the UK does not provide a safe haven for suspected war criminals. A suspect who is here temporarily cannot be said to have a “safe haven” since that person cannot remain any length of time in the UK and cannot become resident here without risking prosecution. The International Criminal Court Act 2001 allows for the prosecution of a person who commits a crime and subsequently becomes resident, so the law does not depend on the nationality or residence of the suspect at the time of the alleged crime.

#### CHANGES TO THE LAW

14. As the note to the Justice Committee sets out, I do not believe that changes to the law in this area are required or desirable. There are very considerable practical barriers to prosecution, but a change in the law will not necessarily make those barriers any easier to overcome. We should work towards practical rather than legal measures, in co-operation with other countries where appropriate. In particular, we are considering with our EU partners what we can do to be more effective in the detection and bringing to justice of suspected war criminals from outside the Union. Many of our EU partners experience similar legal and practical difficulties to the UK when dealing with such cases.

15. In terms of the changes which the Aegis Trust are campaigning for, the practical effect of making the offences retrospective would be to require the investigation of allegations of crimes, including some which may have taken place abroad, or dating back many years. Only a very small proportion of these investigations are likely to result in sufficient evidence for cases to be brought. It is of course important that allegations of such serious crimes are fully investigated. But we would not want to create an assumption that cases will be investigated and tried in the UK, particularly when the country where the offence took place, or where the perpetrator is resident, is able, willing and better placed to hold such a trial.

16. The practical effect of any proposed retrospection will depend in part on the date from which the offences would apply. If there is no time limit, that will mean any crime could be investigated and tried if the suspected perpetrator is or may be still alive. In order to meet the principle that there should be no punishment without law, it is important that any retrospective effect should date from a time when the offences were clearly recognised under international law. In the case of the International Criminal Court Act the statute on which the crimes are based is not retrospective, so it is not necessarily evident that all elements of those crimes were recognised in international law prior to 2001.

17. The Aegis Trust suggest that offences of genocide should be backdated to 1969, offences of war crimes to 1957, and crimes against humanity to 1991. This would ensure that the crimes were recognised either under UK law by the Genocide and Geneva Conventions Acts, or under international law by the statute of the International Criminal Court. But adopting these dates is not without difficulty. It may still mean that some crimes committed during some conflicts will not be covered, and there will be inconsistencies which will be difficult to justify. The inconsistencies of different starting dates could create confusion and difficulty in handling cases, particularly where particular behaviour and particular incidents could constitute more than one offence (an act of genocide could also constitute a war crime, for example).

## RESOURCES

18. Those cases of war crimes which are brought can be very protracted and resource intensive. The investigation and trial of Faryadi Zardad mentioned above is estimated to have cost at least £300,000 in police costs alone, with additional prosecution, court, legal aid and prison costs. One estimate put the total cost at £3 Million. It is difficult to estimate what an average case might be likely to cost, but all the stages of the case including investigations are likely to be complicated by all the factors mentioned in paragraph 5 above

19. As regards police resources, resources and personnel are not ring-fenced and allocated separately for war crimes. Each police force allocates its resources as local priorities dictate. Any increase in workload will therefore mean that resources are spread more thinly, and that other cases will need to be given correspondingly less priority and resources. Whether there should be national funding and resources dedicated to retrospective war crimes allegations is something that would need to be seriously considered, but there is little likelihood that any additional resources will be readily available, and reallocation of existing resources would need to be robustly justified.

## TORTURE (DAMAGES) BILL

20. The Government remains of the view that the Bill raises difficult legal issues with respect to our existing international law commitments. Under the United Nations Convention against Torture, States party are required to establish jurisdiction in their criminal law over the offence of torture, wherever in the world that torture is alleged to have occurred. Section 134 of the Criminal Justice Act 1988 fulfils this obligation in respect of the United Kingdom. This means that, if a person who is alleged to have committed torture is present in our territory, they should either be extradited to face trial overseas, or tried in our domestic courts. While universal criminal jurisdiction over torture is mandated by our international obligations, universal civil jurisdiction is not so required.

21. A unilateral assumption of civil jurisdiction, as provided for by the Bill, would place the UK in breach of our obligations under international law. The exercise of such extra-territorial jurisdiction, even where States and State officials are not involved, remains a difficult and highly controversial area. When the United Nations Convention Against Torture was negotiated, the option of creating an international civil cause of action was, accordingly, not pursued. Furthermore, the United Nations adopted in 2004 the Convention on Jurisdictional Immunities of State and Their Property, after a period of prolonged negotiation. The United Kingdom signed the Convention in 2005. The Convention makes no exception in respect of civil actions in respect of personal injury or death that is alleged to have occurred outside the territory of a State.

22. Clause 1(3) of the Bill states that awards of damages should include aggravated and exemplary damages, together with damages for loss of income. Aggravated and exemplary damages are only available in certain limited circumstances under the common law. The provision in the Bill would go against settled Government policy that there should be no statutory extension of the availability of exemplary damages in civil proceedings. This policy was reiterated in the Department's consultation paper on the law on damages published in 2007.

23. The Government is also concerned that while the Bill could make it possible for those who claim to have suffered torture to seek an award of damages, it would remain essentially impossible to enforce any such judgment against a foreign State. Any attempt to seize the property or assets of a State would be particularly controversial, and liable to lead to retaliatory action against United Kingdom interests.

*February 2009*

## Annex 1

<i>Statute</i>	<i>Effective From</i>	<i>Crimes</i>	<i>Committed where and by whom</i>
International Criminal Court Act and the International Criminal Court (Scotland) Act	2001	— Genocide — Crimes against Humanity — War Crimes — Grave breaches of the Geneva Convention and other serious violations of the laws and customs applicable in international armed conflict. — Violations of Common Article 3 and other serious violations of the laws and customs in armed conflicts not of an international character. — Offences ancillary to the above acts.	In England and Wales, or Northern Ireland, or Scotland, or outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to United Kingdom service jurisdiction
Geneva Conventions Act	1957	— War Crimes — Grave Breaches of the Geneva Conventions and Additional Protocol 1 committed in international armed conflict. — Violations of Common Article 3, committed in armed conflict not of an international character. Each party to the conflict is bound to apply certain minimum conditions and certain acts are prohibited (such as violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment) BUT individual criminal responsibility is not specified by the Act.	Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of grave breach of any of the scheduled conventions or the first protocol Dealt with by service law and domestic criminal law.
Genocide Act	1969 Repealed 2001	— Genocide	Acts committed in the United Kingdom.
War Crimes Act	1991	— murder, manslaughter or culpable homicide if the offence was committed between 1939–1945 in Germany or in places under German occupation; and — constituted a violation of the laws and customs of war.	A person in the United Kingdom, irrespective of his nationality at the time of the offence, if he was a British citizen or resident in the United Kingdom on or after 8 March

<i>Statute</i>	<i>Effective From</i>	<i>Crimes</i>	<i>Committed where and by whom</i>
Criminal Justice Act 1988, ss. 134,135	1988	— Torture	A public official or person acting in an official capacity, whatever his nationality for acts committed in the United Kingdom or elsewhere. A person, whatever his nationality, for acts committed in the United Kingdom or elsewhere, acting at the instigation or with the consent or acquiescence of a public official or person acting in an official capacity.

## Memorandum submitted to the Justice Committee by the Ministry of Justice, October 2008

### THE OFFENCES OF WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE

1. This note responds to the request from the Justice Committee for information about the UK law on war crimes, crimes against humanity and genocide. As below, there are cases currently before the High Court involving four genocide suspects who are the subjects of extradition requests from Rwanda. There may also be others here from Rwanda and from other countries where international crimes have taken place.

2. The Government shares the concern of the Aegis Trust and others that those committing serious crimes of this nature should not escape justice. But finding the right solution is not straightforward and is something currently being considered within the EU as a number of other countries face similar issues to our own. This note sets out position under UK law, the issues that arise in dealing with such crimes and the avenues being pursued to bring those responsible to justice.

### POSITION UNDER UK LAW

3. Whether such individuals can be dealt with under UK criminal law will depend on the circumstances of any given case. Parliament did not consider it right to make the International Criminal Court Act 2001 retrospective so it does not apply to actions committed prior to its commencement. The Genocide Act 1969 applies only to acts within the UK. The Geneva Conventions Act 1957 applies to international armed conflicts, and has limited applicability to internal armed conflict. The offence of torture under the Criminal Justice Act 1988 could apply in cases where there is sufficient evidence of torture but this may not always be the case, and the offence may not always reflect the full range of the offending which took place. A summary of the UK law is attached.

### OUTSTANDING CASES FROM RWANDA

4. Currently, there are a number of countries, including the UK, which are dealing with requests for the extradition of persons who stand accused of their part in the 1994 Rwandan genocide. As at paragraph 1 above, the UK is dealing with four such cases. In those, City of Westminster Magistrates' Court concluded on 6 June 08 that none of the statutory barriers to surrender (as set out in the Extradition Act 2003), availed the men. On 1 August, the Home Secretary decided to order surrender. Both of those decisions are now being contested before the High Court. Hearings begin on 1 December.

5. There are also three cases before the International Criminal Tribunal for Rwanda, which was set up to deal with serious violations of international humanitarian law committed in Rwanda and by Rwandan citizens in neighbouring states. In these cases and pursuant to the Tribunal's completions strategy, the ICTR Prosecutor is seeking to have the defendants transferred to Rwanda for trial. This was refused at first instance by the Trial Chamber for a variety of fair trial and human rights reasons in each case. One appeal judgment has been handed down. In that case the Appeal Chamber did not accept all the arguments which had previously been accepted by the tribunal, but it nevertheless upheld the Trial Chamber decision not to transfer the case to Rwanda. Appeal judgments in the remaining two cases are awaited.

### PARLIAMENTARY GROUP ON THE PREVENTION OF GENOCIDE

6. John Bercow and Mary Creagh of the Parliamentary Group on the Prevention of Genocide recently wrote to the Justice Secretary asking that the law on genocide, war crimes and crimes against humanity should be changed to give them retrospective effect.

7. The position was discussed on 21 October at a meeting hosted by the All Party Group on Genocide Prevention and the All Party Human Rights Group. The main speaker was the Director of Public Prosecutions, Ken Macdonald. The strong view was expressed that those who are alleged to have committed such serious crimes should not be immune from prosecution. The Aegis trust presented and asked for views on a draft Private Members Bill on the topic.

### CONSIDERATION OF AEGIS TRUST REQUEST

#### *Retrospection*

8. The Aegis Trust likewise suggests that the extra-territorial aspect of the law on genocide, crimes against humanity and war crimes should be made retrospective, perhaps to 1991 when the International Criminal Tribunal for the former Yugoslavia has jurisdiction.

9. It would be possible, if unusual, to make the law retrospective, provided it does not become retrospective beyond the point where it was recognised as a crime under international law. The crimes described in the International Criminal Court Act comprise definitions and elements which may not have been recognised prior to the Rome Statute of the International Criminal Court in 1998. So it might not be possible to simply backdate the offences contained in the International Criminal Court Act.

10. Such retrospection was firmly ruled out at the time Parliament debated the Act in 2001, because it was held that retrospection would not provide sufficient certainty about what would constitute an offence and at what period of time. It was also considered important to make the jurisdictions of the UK and the ICC complementary. And there was concern over the impact making the law retrospective could have on previously agreed amnesties.

11. It would be inconsistent if the criminal law were to apply only from 1991. Choosing 1991 would mean that offences which may have taken place prior to that would not be caught.

12. The Government considers the concerns voiced in debate in 2001 remain valid, despite the extremely serious nature of the alleged offences. The best solution remains to extradite suspects to stand trial in the country where their offences took place. Suspects in cases prior to the creation of the International Criminal Court could also be tried in appropriate cases by the relevant international tribunal, although such tribunals should not normally be needed for future conflicts because the International Criminal Court should provide a forum where trials could take place.

#### RESIDENCE REQUIREMENT

13. The Trust also suggests a move from a residence requirement to “presence” requirement. The 2001 Act currently applies to UK nationals or UK residents. This specifically includes those who commit crimes prior to becoming resident and subsequently become residents. The term “resident” is flexible. It does not include visitors or short-term students, for example. But it might include those who have applied for asylum and are waiting for their applications to be decided. We therefore believe it offers the right balance. The Government is committed to the principle that there should be no safe haven for those who have committed war crimes, genocide or crimes against humanity. But visitors who are not seeking to remain in the UK are not seeking a “safe haven” here, and we do not think that this represents a practical gap in the law.

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### Memorandum submitted by Redress

#### I. INTRODUCTION

1. The Redress Trust (REDRESS) is an international human rights organisation based in London with a mandate to assist torture survivors, to prevent their further torture, and to seek justice and other forms of reparation.

2. The Torture (Damages) Bill, introduced by Lord Archer of Sandwell QC, passed its First Reading in the Lords on 14 January 2009; a Second Reading is yet to be scheduled. In parallel, Andrew Dismore MP presented the Torture (Damages) (No. 2) Bill in the Commons. This Bill passed its First Reading on 26 January 2009; and a Second Reading is scheduled for 19 June 2009. In the last parliamentary session, the Bill passed all five stages in the Lords and received a First Reading in the Commons before the session ended and the Bill lapsed.

3. REDRESS published a Compilation of Evidence following Lord Archer’s call for evidence in June 2007. This includes statements from torture survivors and submissions from medical, refugee and human rights organisations in support of the Bill.<sup>54</sup>

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<sup>54</sup> REDRESS, *The Torture (Damages) Bill 2007–08, A Private Member’s Bill to Provide a Remedy for Torture Survivors in the United Kingdom, Compilation of Evidence Received following the Call for Evidence launched by Lord Archer of Sandwell QC* (July 2008), available at: [www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20\\_A4\\_%20 saved.pdf](http://www.redress.org/documents/Evidence%20publication%20-%20FINAL%203%20_A4_%20 saved.pdf).



## II. THE RIGHT TO A REMEDY IN INTERNATIONAL LAW

4. Torture survivors, like victims of other human rights and humanitarian law violations, have a right to a remedy and reparation under international law.<sup>55</sup> The right to a remedy and reparation is itself guaranteed and is applicable at all times, during times of peace and war, and even in times of emergency.<sup>56</sup> Those human rights treaties that mention reparations require states parties to provide for this in domestic legislation.<sup>57</sup> The majority of human rights instruments guarantee both the procedural right to effective access to a fair hearing and the substantive right to reparations (such as restitution, compensation and rehabilitation).<sup>58</sup>

## III. THE NEED FOR THE TORTURE (DAMAGES) BILL

5. There are torture survivors living in the UK who have no remedy for the harm they suffered. Many of these individuals have lasting psychological difficulties and continuing trouble reintegrating into society. Many are unable to work.

6. For a variety of reasons, the courts of the state where the torture occurred may not be available.

7. Moreover, diplomatic protection (where a state espouses a claim of a national who has been wronged abroad) remains a discretionary remedy under English law and is not an adequate and effective alternative for torture survivors.<sup>59</sup> Moreover, in many cases known to REDRESS, the UK Government has failed to espouse the cases of nationals tortured abroad. REDRESS' efforts to seek Government clarification of the exact numbers of espoused cases, have to date failed.<sup>60</sup>

8. The absence of avenues for legal redress means that the consequences of the suffering can never be repaired by the individuals or bodies responsible for the harm. Further, the lack of acknowledgment of the harm can impede survivors' recovery as the sense of injustice continues.

## IV. STATE IMMUNITY

9. To date, state immunity rules have prevented torture survivors from accessing the courts of England and Wales, leaving them without a remedy.<sup>61</sup>

10. By definition, torture is committed by state officials.<sup>62</sup> However, under the State Immunity Act 1978, as a general rule, foreign states are immune from the jurisdiction of the English courts.<sup>63</sup> The Bill proposes a new exception to the State Immunity Act, in order to clearly enable civil claims for damages for torture, or death caused by torture, to proceed without being barred by claims of state immunity. The State Immunity

<sup>55</sup> International law on this point is codified in the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147 (21 Mar. 2006). The right to a remedy and reparation is enshrined in many international human rights treaties. E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (art. 14), Universal Declaration of Human Rights (1948) (art. 8), International Covenant on Civil and Political Rights (1966) (arts. 2(3), 9(5) and 14(6)), International Convention on the Elimination of All Forms of Racial Discrimination (1965) (art. 6), Convention of the Rights of the Child (1989) (art. 39), and Rome Statute for an International Criminal Court (1998) (art. 75). It has also figured in regional instruments, eg European Convention on Human Rights (1950) (arts. 5(5), 13 and 41), American Convention on Human Rights (1969) (arts. 25, 63(1) and 68), and African Charter on Human and Peoples' Rights (1981) (art. 21(2)). The right has also been recognised and further developed in the jurisprudence of international and regional courts, as well as other treaty bodies and complaints mechanisms (see, eg, *Velásquez Rodríguez Case*, Inter-Am Ct. H.R. (Ser. C) No. 4 (29 Jul. 1988) at para 174; and *Papamichalopoulos v. Greece* (Art. 50), Eur. Ct. H.R., App. No. 14556/89, (31 Oct. 1995) at para 34.

<sup>56</sup> Human Rights Committee, General Comment No. 29 on States of Emergency (Art. 4) U.N. Doc. No. CCPR/C/21/Rev.1/Add.11 (2001) at para 14.

<sup>57</sup> E.g., UDHR (art 8), ICCPR (art, 2), UNCAT (art 13), ICERD (art 6), and the Declaration on the Protection of all Persons from Enforced Disappearance (1992), U.N. Doc. No. A/RES/47/13 (art 19). At the regional level see also, ECHR (art 13); the Charter of Fundamental Rights of the European Union (2000/C 364/01) (art 47); ACHR (arts 24 and 25); the American Declaration of the Rights and Duties of Man (1948) (art XVIII); the Inter-American Convention on Forced Disappearance of Persons (1994) (art X); the Inter-American Convention to Prevent and Punish Torture (1985) (article 8); African Charter (arts 3 and 7); and the Arab Charter on Human Rights (1994) (art 9).

<sup>58</sup> See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q. 235. For further discussion on the right to a remedy and to reparation in international law see REDRESS' Submission at pg. 76 of the "Compilation of Evidence" supra n. 1, at paras 4–10.

<sup>59</sup> See further discussion of diplomatic protection in REDRESS' Submission at pg 76 of the "Compilation of Evidence" supra n 1, at paras 23–27.

<sup>60</sup> On 17 July 2008, Sir Malcolm Rifkind asked the Secretary of State for Foreign and Commonwealth Affairs "i) How many British nationals have asked the Government to espouse their claims for damages following allegations of torture by officials or agents of foreign governments, or have requested the Government to intervene on their behalf in these matters, since 8 December 1998; ii) How many claims by British citizens of torture abroad have been espoused by the Government since December 1998, and what the criteria are for determining whether to espouse such a claim". The response detailed the number of allegations raised regarding mistreatment though as records regarding espousal of claims are not collated, it was said that it would incur a disproportionate cost to collate such figures. A subsequent question was posed on 22 July 2008 (and a further question on 2 February 2009). In addition, REDRESS has filed an information request which was rejected on the same basis; a complaint with the Information Commissioner's Office is pending (Case ref. FS50236068). The parliamentary questions and responses and information complaint are appended.

<sup>61</sup> See discussion of *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya and others* [2006] UKHL 26 (currently pending in the Eur. Ct. H.R.) and *Al-Adsani v. United Kingdom*, Eur. Ct. H.R., App. No. 35763/97 (21 Nov 2001) in REDRESS' Submission at pg 76 of the "Compilation of Evidence" supra n. 1, at paras 11–13.

<sup>62</sup> See, eg, the Criminal Justice Act 1988 (c 33) (Section 134).

<sup>63</sup> State Immunity Act 1978 (c 33) (Section 1(1)).

Act already has exceptions, for example, for breaches of commercial contracts, and for torts committed in the UK.<sup>64</sup> The Bill, therefore does not fundamentally change the character of the State Immunity framework under UK law, it simply adds an additional exception.

#### V. THE BILL IS A PRACTICAL SOLUTION, SEEKING TO PROVIDE ACCESS TO JUSTICE FOR TORTURE SURVIVORS WITHOUT “OPENING THE FLOODGATES”

11. The Bill seeks to address the specific and limited situation where torture survivors are left without a remedy. It is not aimed at encouraging “forum shopping” but is designed to deal practically with the very real and immediate needs of torture survivors in the UK who are unable to access justice anywhere else. For this reason, the Bill is tightly drafted and offers a practical approach to dealing with this English law issue.<sup>65</sup>

12. The Bill is limited to torture and does not extend to other international crimes, such as genocide, crimes against humanity and war crimes, though victims of such crimes are equally entitled to reparation. A broader approach could be regarded as consistent with the UK’s international commitments to combat impunity for such crimes.<sup>66</sup> However, maintaining the Bill’s present focus on torture will help to alleviate fears of a flood of litigation in the English courts.

13. The Bill does not extend to “cruel, inhuman and degrading treatment and punishment”. The inclusion of ill-treatment would be in line with international law, in particular the Convention against Torture,<sup>67</sup> but the Bill’s narrow focus on torture will provide access to justice to a particular category of vulnerable individuals while stemming any concerns that the Bill could result in a flood of claims given the breadth of acts which could potentially fall within the definition of “ill-treatment”.<sup>68</sup>

14. The Bill has retroactive effect, but this is limited to acts of torture occurring on or after 29 September 1988, to reflect the date of entry into force of section 134 CJA; to allow torture survivors currently living in the UK to access justice; and because the Convention against Torture entered into force on 26 June 1987. It has been noted that the Convention against Torture does not restrict the prohibition of torture temporally, and that states should provide for reparations to be recovered by torture victims and their families irrespective of when the torture took place. Therefore, some have recommended that the Bill be amended to permit actions in respect of torture committed since it was recognised as a crime under international law.<sup>69</sup> However, restricting the retrospective effect of the Bill alleviates fears of stale claims and of a flood of litigation.

15. Any danger of stale claims or a flood of litigation is minimised by including a limitation period of six years, beginning with the date when it first became “reasonably practicable” for the person concerned to bring the action.

Under English law, the starting point for actions in tort is a time limit of six years from the date the cause of action accrued.<sup>70</sup> However, there is a special time limit for actions in respect of personal injuries: three years subject to the discretion to exclude or extend this where it would be “equitable to do so”.<sup>71</sup> However, applying a three-year limitation period to claims involving allegations of torture would give rise to serious practical concerns. For example, torture victims are often unable to speak about their experiences for a long time after the event.<sup>72</sup> Moreover, unlike other personal injury claims, torture victims need time to find a specialised lawyer. REDRESS would, therefore, favour at least the retention of the six-year limitation period currently provided for in the Bill.

<sup>64</sup> See the “Exceptions from immunity” provisions in Sections 2 to 11 of the State Immunity Act 1978. For further discussion of existing exceptions in the State Immunity Act 1978, see REDRESS’ Submission at pg. 76 of the “Compilation of Evidence” supra n. 1, at para 15.

<sup>65</sup> For further discussion of these limitations on the scope of the Bill, see REDRESS’ Submission at pg 76 of the “Compilation of Evidence” supra n 1, at paras 28–37.

<sup>66</sup> See Lady Fox CMG QC’s comments that the Bill “attempts too little and will introduce an anomalous situation. Such a proposal should apply to all international crimes for which the UK and the foreign State against whom proceedings are to be brought have entered into obligations to prosecute in their national courts” (Written Comments of Lady Fox CMG QC at pg 87 of the “Compilation of Evidence” supra n 1, at para 11). Lady Fox caveats her submission by noting that, “[b]ut English law can only give effect to such a widened proposal after the necessary modification of international law by international conventions imposing obligations on State to exercise universal civil jurisdiction in respect of proceedings for reparation for the commission of international crimes” (also at para. 11). This issue will be discussed further below.

<sup>67</sup> See UN Convention against Torture (art 16(1)).

<sup>68</sup> Eg, it has been suggested that including other types of ill-treatment in the Bill could potentially cover conditions of detention abroad which fall below ECHR standards. This is especially so given that in civil cases the individual victim decides whether to bring a suit (whereas in the criminal sphere, this decision is taken by the Director of Public Prosecutions and/or the Attorney-General).

<sup>69</sup> See Amnesty International’s submission at pg 56 of the “Compilation of Evidence” supra n 1, at pp 3 and 5.

<sup>70</sup> Limitation Act 1980 (c 58), Section 2.

<sup>71</sup> Limitation Act 1980, Sections 11 and 33. See also, *A (Appellant) v Hoare (Respondent) and related appeals* [2008] UKHL 6.

<sup>72</sup> Lord Hoffman commented in *Hoare*, *ibid.*, that “[t]his does not mean that the law regards as irrelevant the question of whether the actual claimant, taking into account his psychological state in consequence of the injury, could reasonably have been expected to institute proceedings. But it deals with that question under section 33, which specifically says in subsection (3)(a) that one of the matters to be taken into account in the exercise of the discretion is “the reasons for...the delay on the part of the plaintiff” at para 44. However, Baroness Hale of Richmond stated in *Hoare*, *ibid.*, that: “[t]he abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims. Six years, let alone three, from reaching the age of majority is not long enough...” at para 54.

Some have called for the exclusion of a limitation period in line with international law,<sup>73</sup> which recognises that statutes of limitation do not apply to certain crimes.<sup>74</sup> Similarly, REDRESS would favour the extension of the six-year period to reflect the seriousness of torture as a crime.<sup>75</sup> However, REDRESS recognises that a limitation period may be necessary to allay fears of a flood of claims in the English courts.

16. Exhaustion of domestic remedies: The Bill only applies when no adequate and effective remedy for damages is available in the foreign state where the torture is alleged to have occurred. This reflects international law standards on the exhaustion of local remedies.<sup>76</sup> It has been argued that the Convention against Torture does not require the exhaustion of domestic remedies and that the provision should either be deleted or amended to place the burden on the defendant state, rather than on victims and their families.<sup>77</sup> This would recognise that the defendant state is often better placed to provide evidence about the existence of domestic remedies. However, maintaining this rule may help to alleviate concerns about a flood of litigation in the English courts.

17. *The forum non conveniens* doctrine would operate to stay proceedings, "...where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for trial of the action, ie in which the case may be tried more suitably for the interests of all parties and the ends of justice".<sup>78</sup>

18. Finally, vexatious and frivolous cases would not meet the civil "balance of probabilities" standard of proof required.

## VI. RESPONDING TO SOME POLITICAL CONCERNS ABOUT THE BILL

19. State immunity originally developed in order to protect state sovereignty. However, state sovereignty is not fixed, but rather evolves with time, and this is reflected in the progressive inclusion of exceptions to immunity, as in the UK State Immunity Act for example. So, for example, the absolute prohibition of torture imposes obligations *erga omnes*, meaning that the international community as a whole has a legal interest

<sup>73</sup> See eg, Amnesty International's submission at pg 56 of the "Compilation of Evidence" supra n 1, at pg 3. See also, Lord Thomas of Gresford's statement during the Bill's Second Reading in the 2007–08 parliamentary session, that "[i]t could be argued, frankly, that where torture is concerned there should be no limitation period" (Hansard Transcript, (House of Lords Debates) Volume No 701, Part No 94 (16 May 2008) at Column 1203, Lord Thomas of Gresford 10:36 am at Column 1211). It has also been suggested that if the limitation clause is not deleted in its entirety, it should be amended to place the burden of proof on the defendant to show that the victim or their family could reasonably have been expected to bring an action within the time limit (Amnesty International's submission at pg 56 of the "Compilation of Evidence" supra n 1, at pg 5). However, it is likely that the victim would be in a better position than the state to show when it became reasonably practicable to raise a claim (eg, by adducing medical reports, psychological reports or statements from their lawyer).

<sup>74</sup> Eg, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, CETS No.: 082 (Open for signature by the member States of the Council of Europe, in Strasbourg, 25 Jan 1974 and Entered into force 27 June 2003); and the Rome Statute of the ICC (art 29). See also, UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, supra n 2, at Part IV at paras 6 and 7.

<sup>75</sup> See, eg, the Torture Victims Protection Act (1991) in the United States, which provides for a 10-year limitation period. See also, *Arce et al v Garcia and Casanova* (28 Feb 05), also in the US, where the US Court of Appeals for the 11th Circuit applied a 10-year limitation period to the Alien Tort Claims Act (1789), although this did not contain an express limitation clause. The Court also noted that these statutes of limitation could be subject to equitable tolling. See also, *Arce et al v Garcia and Casanova* US Court of Appeals for the 11th Circuit, (5 Jan 2006) to similar effect; and commenting at pg 22–23 that "[t]his case, however, exemplifies the kind of "extraordinary circumstances" that, in the interests of justice, require equitable tolling. The remedial scheme conceived by the TVPA and the ATCA would fail if courts allowed the clock to run on potentially meritorious claims while the regime responsible for the heinous acts for which these statutes provide redress remains in power, frightening those who may wish to come forward from ever telling their stories. We therefore find that the district court did not abuse its discretion in holding the plaintiffs' claims to be timely under the doctrine of equitable tolling".

<sup>76</sup> Eg, the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (art 44(b)) and ECHR (art 35(1)) both set out the exhaustion of local remedies rule. The Eur. Ct. H.R. has stated: "[i]t is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement" (para. 68). The Court continued, "[o]ne such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of" (*Akdivar v Turkey*, Eur. Ct. H.R., App No 21893/93 (16 Sept 1996) at para 68). The European Court in *Akdivar* also held that the exhaustion of domestic remedies rule is also "inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective" (para 67). See also, *Selmouni v. France*, Eur. Ct. H.R., App No 25803/94, (28 Jul 1999), at paras 74–75.

<sup>77</sup> See eg, Amnesty International's submission at pg 56 of the "Compilation of Evidence" supra n 1, at pg 3 and 5.

<sup>78</sup> *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 476. See also section 49 of the English Civil Jurisdiction and Judgments Act (1982) (c 27). One option would be to expressly reference the doctrine of *forum non conveniens* in the Bill, in order to minimise concerns about a flood of claims before the English courts. This was recognised by Lord Thomas of Gresford during the Bill's Second Reading in the Lords in the 2007–08 parliamentary session: "Amnesty International has a valid criticism in its suggestion that the argument of *forum conveniens* or *forum non conveniens* should rest with the defendant state; it would be for the state to prove that the forum chosen was not correct. Maybe that is implicit in the clause as drafted, but it could be made rather more explicit" (Hansard transcript, supra n 20, Lord Thomas of Gresford 10:36 am at Column 1211).

in protecting such rights. Notions of state sovereignty have, therefore, changed and, as regards the prohibition of torture, an exception to state immunity would actually be consistent with state sovereignty rather than harmful to it.<sup>79</sup>

20. Threat to international relations. This is difficult to measure; there may be a risk that international relations will be damaged by claims and that states will enact reciprocal legislation.<sup>80</sup> However, allegations of torture committed by foreign state officials can be investigated and prosecuted in a criminal context in the courts of England and Wales (and the Attorney-General cannot take international relations into account when deciding whether the case will proceed). So, there appears to be no justifiable basis upon which to deny access to the civil courts for the same underlying crime.<sup>81</sup> Further, it should be recognised that the State which tortures British citizens is the cause of any damage to international relations; the UK Government, by enabling civil suits in its Courts would simply be responding to an external situation created by other states' actions in line with the UK's oft-stated position that it abhors torture.

## VII. RESPONDING TO SOME LEGAL QUESTIONS ABOUT THE BILL

21. Damages: The Bill provides for the award of aggravated and exemplary damages, and damages for loss of income, in a case of torture or death caused by torture. Allowing exemplary damages reflects the heinous nature of torture, which constitutes a particular affront to the dignity of the individual; and would act as a deterrent to perpetrators. However, in line with the UK Government's position that the function of exemplary damages is more appropriate to the criminal law,<sup>82</sup> the Bill could be amended to remove the reference to exemplary damages, while retaining the reference to aggravated damages, which compensate for mental distress.<sup>83</sup>

It has also been recommended that the Bill be amended to provide for a broad range of damages for torture; and should specify that claimants can seek and obtain other reparations.<sup>84</sup> However, as currently drafted, the Bill's focus is narrow: to provide a civil remedy in damages for torture survivors in the UK, where they would otherwise be left without a remedy. It is arguable that widening the Bill beyond this would not fall within the intended scope of the Bill.

### 22. Permissibility under International Law:

State Immunity: It has been suggested that international law obliges the UK to provide state immunity to foreign states and officials where torture is alleged. On this construction of state immunity, immunity is the general rule and is subject to specific, enumerated exceptions.<sup>85</sup> Another view however, is that state immunity represents an exception to a general rule of jurisdiction. Indeed, over the years, states have

<sup>79</sup> For further discussion, see REDRESS' Submission at pg 76 of the "Compilation of Evidence" supra n 1 at paras 38–40.

<sup>80</sup> Eg, in other immunity-related cases, states have raised international relations as an issue. See eg, "*Chile says Pinochet case could damage UK ties*", CBC News (28 Nov. 1998): <http://www.cbc.ca/world/story/1998/11/28/pinochet981128.html>. See also, *Case Concerning Certain Criminal Proceedings in France ( Republic of the Congo v France )*, ICJ, Request for the Indication of a Provisional Measure, Summary of the Order of 17 Jun 2003, (at paras 22–40); and Keith Sealing, "States Sponsors of Terrorism" Is a Question Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did before 9/11", 38 Tex. Int'l L.J., (119–144) (2003) (at 121).

<sup>81</sup> In short, international relations may be threatened in some cases where a torture survivor brings a civil claim for damages in the courts of England and Wales against a foreign state or its officials. Firstly however, all states have an obligation not to torture, to prevent torture, and to provide reparations where torture has occurred. In this regard, it must be remembered that all states are bound by the absolute prohibition of torture, irrespective of whether or not they have signed the Convention against Torture, because it is regarded as a higher rule of international law. Secondly, the Bill specifically provides for the exhaustion of domestic remedies and, if foreign states do not wish to be sued in the English courts, they should first, refrain from torturing, and second, open up their own legal systems and provide adequate and effective remedies to torture survivors. Finally, the Bill's coverage is neutral. It does not single out one particular state for attention and, in this way, de-politicises the process.

<sup>82</sup> See, Department of Constitutional Affairs, "*The Law on Damages*", Consultation Paper CP 9/07 (04/05/2007) at para 198. However, note Lord Archer of Sandwell QC emphasising that, "[t]here are jurisdictions where a right to reparation follows a criminal conviction and there is an almost artificial distinction in discussing whether we are talking about criminal or civil proceedings", Hansard transcript, supra n 20, Lord Archer of Sandwell QC 12:07pm at Column 1229.

<sup>83</sup> If Clause 1(3) is amended to remove the reference to exemplary damages, Clause 1(4) should be amended accordingly. This would also be consistent with the Law Reform (Miscellaneous Provisions) Act 1934 (c 41), which provides that "[w]here a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person— (a) shall not include— (i) any exemplary damages" (Section 1(2)). Clause 1(4) could also be amended to remove the reference to the 1934 Act: whilst Section 1(2) of the 1934 Act prevents an estate from recovering exemplary damages, it does not exclude aggravated damages.

<sup>84</sup> Eg, Amnesty International's submission at pg. 56 of the "Compilation of Evidence" supra n 1, at pg 3 and 5. See also, Written Comments of Lady Fox CMG QC at pg 87 of the "Compilation of Evidence" supra n. 1 at para 21, that "[m]oney damages forms a small part in the types of reparation which breach of human rights law requires a State to provide—rehabilitation, provision of housing, employment—none of which under present law apply against a foreign State without its cooperation". See also, UN Convention against Torture, which provides in art. 14(1) that, "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation".

<sup>85</sup> Eg, Lord Hunt of Kings Heath OBE commented that, "[t]he general principle of international law remains that one state is not subject to the jurisdiction of another except in certain recognised circumstances", Hansard transcript, supra note 20, The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath) 11:53am at Column 1227.

adopted different approaches to state immunity and have transitioned from an absolute rule of state immunity to a restrictive rule,<sup>86</sup> and exceptions to immunity have been recognised progressively in order to deal with new situations. As Lord Woolf commented at the Second Reading last session,

I submit as forcefully as I can that the outcome of the Bill will send a signal to other parts of the world about how this country views the offence of torture. It is perhaps unfortunate that the State Immunity Act was passed in 1978 but that the convention on torture, to which reference has been made, dates from 1984. I wonder whether, if the order had been reversed and the number of states that would ratify the convention on torture had been known, the absence of torture as an exception to the State Immunity Act would have been rectified.<sup>87</sup>

Reference has also been made to the *United Nations Convention on Jurisdictional Immunities of States and Their Property 2004*, which codifies the restrictive approach to state immunity as currently found in domestic statutes such as the UK State Immunity Act.<sup>88</sup> However, the UN Convention has not yet entered into force, as it requires 30 ratifications before it can do so.<sup>89</sup> Moreover, international law evolves with time. The Convention cannot entrench or crystallise international law on state immunity for the future; and cannot prevent states from expanding the restrictive approach to state immunity. The UK has always been a leader in this respect.

Universal Civil Jurisdiction: It has also been questioned whether international law permits the exercise of universal civil jurisdiction in respect of torture.<sup>90</sup> However, another view is that Article 14 of the Convention against Torture, at a minimum *permits* the UK to create a civil remedy for torture survivors in the UK, which would be achieved by enacting this Bill, and at a maximum *requires* it to do so. In fact, unlike some other provisions in the Convention against Torture, Article 14 is not limited territorially. Such an approach would also be consistent with the right to a remedy under international law, which imposes an independent and continuing obligation on states to provide effective domestic remedies for victims of human rights violations.<sup>91</sup>

Enforcement: It has been stated that international law would not allow the verdict of an English court to be enforced on a foreign state; and/or that it would likely be impossible to enforce any such judgment without damaging consequences for the UK.<sup>92</sup> There are various interpretations of the law on enforcement. Furthermore, for some torture survivors, financial compensation would alleviate the financial difficulties of life after torture; as already noted, many are unable to work in order to finance their medical and living expenses. However, for others, access to justice and a finding of liability would itself provide an acknowledgment of the wrong that was done to them, and would send a clear message that torture will not be tolerated wherever in the world it occurs.

## VIII. CONCLUSION

23. REDRESS strongly supports the enactment of the Torture (Damages) Bill. We believe that this is a unique and timely opportunity for the UK to reaffirm its commitment to enforcing the absolute prohibition of torture and to ensuring torture survivors in the UK can obtain justice, where no adequate and effective remedy exists elsewhere.

24. We would be willing to provide further information to the Committee if required.

March 2009

<sup>86</sup> However, see Written Comments of Lady Fox CMG QC at pg 87 of the “Compilation of Evidence” supra n 1, at para 4: “[a]ny proposal must recognise that the abandonment of absolute immunity from civil proceedings for commercial transactions is very recent in most civil countries and that the restrictive doctrine has only been fully adopted in the US, UK, Australia, Netherlands, and Switzerland and more recently in Germany and France”.

<sup>87</sup> Hansard transcript, supra note 20, Lord Woolf 11:24am at Column 1220.

<sup>88</sup> Eg, Hansard transcript, supra note 20, The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath) 11:53am at Column 1227–1228. See, eg, Written Comments of Lady Fox CMG QC at pg 87 of the “Compilation of Evidence”, supra n 1, at paras 4–5.

<sup>89</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 Dec 2004) (Art 30). As at 5 Mar 2009, according to the UN Treaty Collection website (<http://treaties.un.org>), there were 28 signatories and 6 parties to the Convention.

<sup>90</sup> Eg, Hansard transcript, supra note 20, The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Hunt of Kings Heath) 11:53am at Column 1227–1228. See also, Written Comments of Lady Fox CMG QC at pg 87 of the “Compilation of Evidence”, supra n 1, at paras 13–14, and 22.

<sup>91</sup> “*State Immunity: Selected Materials and Commentary*”, Andrew Dickinson, Rae Lindsay and James P. Loonam (Clifford Chance LLP) (Oxford University Press, 2004) (para 4.007 at page 337): “... it is necessary to have regard to the United Kingdom’s international obligations, both under customary international law and under international instruments [footnote: For example, the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 10 December 1984 (Cm 1775) (ratified by the United Kingdom on 8 December 1988)]... they may influence the construction of particular provisions or require future amendment of the 1978 Act to ensure its compatibility with treaty obligations”.

<sup>92</sup> In a national law context, some have pointed to the State Immunity Act 1978’s rules relating to immunity from execution (see, eg, Section 13(2)–(5)).

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**Supplementary memorandum submitted by Kevin Laue, Redress**

I would be grateful if I could supplement something which arose at the hearing on Wednesday under the first question raised in REDRESS' response to the Government's assertion that the UK has no international mandate on/for universal jurisdiction for civil claims.

In addition to the various submissions made orally on this first area, I reiterate that we referred in our written submission at paragraph 22 to the permissibility under international law for the UK to allow its courts to be used against foreign states/individuals where a victim wishes to sue on the basis of a torture tort. Any argument that the recent UN Convention on Jurisdictional Immunities of States and Their Property 2004 somehow prevents the UK from amending its domestic legislation to add a further exception to the State Immunity Act 1978 is not sustainable, and needs to be viewed in a proper context: firstly, the recent Jurisdictional Convention is not yet in force as it requires 30 ratifications and to date there are only six parties to it, and 28 signatories; secondly, this can and should be compared to the 1984 UN Torture Convention (and all the obligations under it) which has been in force for more than 20 years and currently has 146 parties—indeed, the Torture Convention is one of the most widely ratified of all international treaties; thirdly, international law evolves with time and the Jurisdictional Convention, even if/when it comes into force, cannot and will not entrench or crystallise international law on state immunity for the future—it therefore doesn't prevent states from expanding the restrictive approach to state immunity in which the UK has always been a leader.

3 July 2009

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**Memorandum submitted by Tamils Against Genocide**

The Committee has called for information and views in the following terms:

- (a) Genocide and Torture;
- (b) UK legislation relating to genocide, torture and related offences

The Joint Committee on Human Rights has recently agreed to undertake a short inquiry on UK legislation relating to genocide, torture and related offences committed abroad. The Committee has written to the Secretary of State for Justice asking for a memorandum on UK law and prosecutorial policy in this area, following the speech by the then Director of Public Prosecutions, Sir Ken Macdonald QC, on 21 October 2008, drawing attention to the differences in legislation relating to the various offences and the practical impact this could have on the UK's ability to secure convictions for such crimes. The Committee intends to hear oral evidence in the Spring.

The Committee is seeking information and views on:

- (a) the number of prosecutions under the Genocide Act 1969, the Geneva Conventions Act 1957 and the International Criminal Court Act 2001 for genocide, war crimes and crimes against humanity offences committed abroad, and their outcomes;
- (b) the number of suspected perpetrators of genocide, war crimes and crimes against humanity present in the UK who cannot be prosecuted because of the date the crimes occurred or because they are not resident in the UK;
- (c) the rationale for the differences in the legal regimes applying to the offences of genocide, war crimes and crimes against humanity committed abroad; and
- (d) whether the law should be changed to ensure it is more consistent and what the practical consequences of change may be, for example in terms of police resources required to investigate such crimes.

**OVERVIEW**

1. This submission is intended to focus primarily upon the third and fourth issues raised by the Committee within its terms of reference. Matters relating to the first two questions are more readily answered by the relevant organ of government.

2. It is contended that:

- (a) On inspection, the United Kingdom would be assessed as “weak” having regard to its ability to secure legal redress against those who perpetrate genocide, torture, or crimes against humanity;
- (b) On inspection, the United Kingdom would be assessed as “weak” having regard to its capacity to secure convictions to mark the commission of these crimes abroad;
- (c) The ICC is a useful complement to domestic tribunals but it is of limited utility given that states which are likely to commit or permit these wrongs are not party to its statute or jurisdiction;

- (d) Whilst there is good reason to maintain a multiplicity of jurisdictions applying to offences of genocide, war crimes or crimes against humanity, this should not permit a culture to develop whereby responsibility for prosecution is assumed to be undertaken elsewhere, nor is it ground for the domestic jurisdictions adopt only limited responsibility for enforcement;
- (e) The Committee should secure change in the law so as to facilitate the obtaining of redress. The UK should exert a right to claim wider jurisdiction and develop its capacity to identify where such wrongs are being committed, and, for gathering evidence in support of prosecution.

#### ASSUMPTIONS

3. The present submissions are confined to the inquiry relating to the commission of Genocide, Torture, and Crimes against Humanity as defined.

4. For present purposes it is assumed that this inquiry does not investigate to Members of the UK armed forces or security organs.

#### DEFINITIONS: INTERNATIONAL INSTRUMENTS

5. An acceptable working definition of torture for present purposes can be taken from the Torture Convention. The relevant parts are set out in Appendix 1 hereto. It is presently sufficient to note that it allowed for states to claim universal jurisdiction, and, positively required (within its terms) member states to assume and exercise jurisdiction over alleged torturers.

6. A similar approach was for the crime of Genocide codified within the Genocide Convention 1948, (Relevant extracts in Appendix 2).

7. As a matter of definition the scope of “Crimes against humanity” is more difficult to determine. Its historical origins can arguably be traced back to a declaration issued in the face of the Genocide in Armenia in May 1915. Its advent was a development of public international law in so far as it supplemented the limited historic concepts of the Law of War and the Law of Peace. It was taken significantly further by its adoption in the Nuremberg Charter in 1945.

8. Whereas the Nuremberg Charter had adopted a definition of a crime against humanity as being:

*“murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated”*

Matters have moved on since. The Nuremberg definition was developed by addition within the ICTY Tribunal as also including:

*“torture, rape and imprisonment as part of acts constituting crimes against humanity (murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and “other inhumane acts”, when committed in armed conflict, whether international or internal in character, and directed against any civilian population”*

(Emphasis added)

9. Relevant extracts of the Statute of the International Criminal Court has been set out separately in an Appendix 3. At Articles 6–8 it sets out its definition of Genocide, Crimes against Humanity and War Crimes.

10. It will be noted that the concepts of “War Crimes” and “Crimes against Humanity” potentially include conduct defined as torture. That is not to say that torture as a crime is proven in these contexts on the same grounds as torture contrary to the Torture Convention. This transposition of the same “core wrong” in what are substantially different offences is ultimately unhelpful. As it will be shown, it is a paradox that in relation to the “simple offence” of torture, the UK claims universal jurisdiction, but it does not do so for these other grave crimes.

#### DOMESTIC LEGISLATION

11. In a separate appendix (4) relevant sections of the Criminal Justice Act 1988, the War Crimes Act 1991, and the International Criminal Court Act 2001 (ICA 2001) are set out.

#### PROBLEMS

*The limited and divergent nature of jurisdiction claimed by the UK in these respects:*

12. The Criminal Justice Act 1988 (CJA 1988) which rendered torture an offence, claims universal jurisdiction for the Courts of the United Kingdom. (See section 134). The prohibition against torture is a rule of *jus cogens* within international law—that is to say a peremptory norm from which no derogation is permitted. (See also Prosecutor v. Furundzija [1998] ICTY 3; cited at A. V. SSHD [2005] UKHL 71, para. 33). Torture in this context has a very limited meaning, shorn of any *additional* element of fault arising from “context” such as stigmatises offences of War Crimes or Crimes against Humanity.

13. Paradoxically, the House of Lords in Jones' case [2006] UKHL 26 prevented the UK Courts from exercising civil jurisdiction over states and individuals alleged to be responsible for torture. It ruled that:

- (i) As current domestic and international law stands, a State could not be subject to the civil jurisdiction of another state unless this was specifically allowed for. The default position is that states are immune from suit;
- (ii) A prospective litigant could not go behind state immunity by seeking to sue a private individual *in lieu* of the state;
- (iii) The present state of international law, as referred to by the European Court of Human Rights in *Al-Adsani v. UK* (2001) 34 EHRR 273, was that a state still enjoyed immunity from suit in the Courts of other states even when acts of torture were alleged;
- (iv) This position in civil law was to be distinguished from the position within criminal law.<sup>93</sup>

14. The War Crimes Act 1991, (WCA 1991) has a very limited sphere of application, being restricted to murder, manslaughter or culpable homicide if it occurred between 1939 and 1945 in a place which was under German Occupation AND it constituted a violation of the laws and customs of war. It is a regime which is shortly likely to fall into desuetude owing to the age of potential offenders (or victims).

15. The International Criminal Court Act 2001, (ICCA 2001) limits its claim for jurisdiction to offences committed in the UK, or if committed outside the UK, to UK nationals, residents or persons subject to its service jurisdiction at that time. Whilst there is a "saving provision" in that section 68 allows for a person not falling within this jurisdiction to become subject to it in the event that they later become resident in the United Kingdom, it is deliberately drafted to fall short of claiming universal jurisdiction although its subject matter is supposed to comprise a response to universally recognised wrongs. It emasculates the UK in this area in so far as enforcement of international law is concerned.

#### *The conflict(s) in the scope of jurisdiction*

16. This can be illustrated by a simple example:

*A notorious torturer, being a citizen of country X, arrives within the UK. He is rapidly identified. It is known that allegations against him personally have been consistently made in the press since his appointment as chief of the secret police of X. Country X has been in flux through this time owing to the presence of a significant and rebellious minority who wish for self-determination.*

He moves to a glamorous central London hotel, proclaiming he is a tourist, visiting to celebrate his 100th birthday. He is granted a visa to enter limited in its terms.

17. What would follow?

- (a) The alleged offender might be arrested with a view to being prosecuted under the CJA 1988, (if offences post-dated its entry into force). This would be on the basis that he had tortured people.
- (b) He might not be arrested under the ICCA 2001, until he became resident in the UK.
- (c) If the allegations were of sufficient antiquity he might fall foul of the WCA 1991 and be liable for prosecution.

18. The differences in potential liability for what is qualitatively the same act in the eyes of the right-thinking member of the public is apt to diminish the standing of the international prohibitions in question and the deterrent effect of domestic legislation. Paradoxically, the "lesser" offence of torture, shorn of the additional elements relating to crimes against humanity are easier to prosecute and prove.

19. The UK should forthwith claim universal jurisdiction and amend the scope of the ICCA 2001.<sup>94</sup> Whilst this could mean that there is little by way of prosecution owing to evidential difficulties, this is a lesser problem than an absence of prosecution owing to the legal incapacity to instigate it. In an ideal world such crimes would not occur. The consent of the Attorney-General to prosecutions has been and could still be retained as a "filter" to prosecutions.

20. At the very least the ICCA 2001 could be amended to vary the assumption of jurisdiction to any person who becomes a resident in Europe or Citizen of a European Union State.

<sup>93</sup> This may be overturned by primary legislation. If so, it supports the argument that the UK should adopt a bolder approach to the question of claiming jurisdiction. This would meet the fears expressed by the DPP and rationalise the varying regimes.

<sup>94</sup> This is a difficult issue politically. In legal terms it raises the underlying questions as to:

- What is the UK's responsibility to act domestically or internationally?
- Can the UK seek to act beyond its bare minimum obligations?



*Unwillingness by nation states to assume jurisdiction or deploy international legal remedies*

21. The countries which are party to the jurisdiction of the ICC are not those where there is a real prospect of the ICC being able to become engaged with real and present atrocities.

22. States or other international institutions only feel compelled to act where it is faced with persistent evidence of large scale atrocity and media pressure. A large number of the crimes against humanity do not occur in the public eye, or on a discernibly large scale sufficient for the international media to pay attention to it.

23. Citizens of State's party to the ICC are unlikely to be able to compel it to exercise jurisdiction. This is to be contrasted to the regime created by the European Convention on Fundamental Rights and Freedoms which ensures a greater degree of "rights compliance" by empowering citizens to bring actions before the Court;

*Inability of national prosecutors to deal with such crimes by way of prosecution or disruption*

24. The CPS and/or the police do not have a truly developed capacity to deal with investigation or prosecution of these offences. They have admittedly drawn up and published a relevant policy for investigation, but it does not form part of its mainstream work, nor are significant resources dedicated to it.

25. The UK has not sought to deploy extant legislation (for example the Proceeds of Crime Act 2002) (POCA) so as to facilitate the restraint of the funds of those states (or individuals) suspected of such crimes as fall within the present inquiry. Absent a constructive approach to POCA (see below para. 27) financial orders as an adjunct to inquiry and crime prevention are not conceived of save in the limited circumstances contemplated within the ICCA 2001. In such a case this is where support is given by way of assistance to the ICC, which itself has only limited power to act against offenders (See Appendix 4 with reference to Schedule 6 of the ICA 2001).

26. Disruption is a recognised technique of law enforcement, particularly as adopted by HMRC. Non-criminal sanction can be utilised by prosecuting authorities to disrupt crime and to prevent its fruits being used. This is part of the gamut of criminal law, and as such, arguably avoids the problems identified by Jones (cited above).<sup>95</sup>

27. Section 340(2)(b) POCA 2002 permits *any* criminal property to be stigmatised if the crime in question would constitute a wrong *if* committed within the UK—no case is known when this has been deployed in the context of the instant offences. This could be interpreted as a wider claim for jurisdiction than is contained within the any of the pieces of legislation referred to in the terms of reference, or above.

28. An international regime was rapidly and comprehensively developed to deal with individuals identified as being terrorists or connected to terrorism. A similar regime should be developed to deal with those who are responsible for torture and genocide—not as civil sanction, but as an adjunct to the criminal law. A clear message that the UK, is not, and will not be a safe haven, for those who commit these crimes has to be underlined and maintained.

*There should be a greater emphasis on intelligence and evidence gathering*

29. There is no reason to contemplate that the information provided by those who seek protection from the UK (whether pursuant to the Refugee Convention, or otherwise), is presently collated or analysed with a view to making sure that intelligence or evidence is not lost, and is therefore available in the future for the purposes of prosecution.

30. In tandem with the approach above, prosecuting authorities may need to seek and obtain greater co-operation from the Security Service so as to establish at the earliest opportunity when an incident is likely to give rise to offences of this type. Similarly, a greater degree of co-operation should be institutionalised with the relevant international institutions and NGO's which have on the ground experience within the areas in which the UK does not have an effective presence.

## PREVALENCE

31. No doubt explanations can be given that there are greater legislative priorities at any given time. The question of priority must depend however on the extent of the problem faced.

32. There is no wholly accurate system which can be deployed to assess the prevalence of such wrongs. However the efficacy of any system which contemplates action including prosecution must to some degree contemplate the prevalence of the "crime" against which it is set.

<sup>95</sup> The position is arguably considerably different in the US. See for example the recent prosecution instigated against Sri Lankan commanders in the US District Court. A copy of the indictment is at Appendix 5. This is being prosecuted alongside an injunction seeking to restrict the provision of funding to the Sri Lankan Government so as to reduce its capacity to continue its actions. There is no good reason why, in principle the UK authorities should not seek to equip themselves to act.

Oral evidence can be made available to the Committee from a US lawyer engaged in the matters referred to.

As to the wider questions relating to a States obligation to act, the Committee is invited to hear from Professor Francis Boyle. Professor Boyle has argued consistently that States have a greater responsibility for active involvement in the prevention of Genocide than they have hitherto been prepared to acknowledge.

33. Quantification will always be influenced by definition. There is an admitted difference between the various relevant provisions of domestic law. However it is submitted that it is nonetheless appropriate to seek to estimate the prevalence of torture and—or crimes against humanity in order to estimate the extent of the problem.

34. Take torture as an example. By its very nature it is often committed in circumstances where an individual is detained, and completely subjugated to person(s) purporting to deploy lawful authority over them. Save for high-profile individuals, the chances of it being identified become limited, if not negligible, particularly if the individual tortured does not leave the jurisdiction in which it happened. (If they do, they are often unable to return).

35. Why is this so? Experience dictates that in societies where torture becomes culturally endemic, the other organs of the relevant state become institutionally ineffective or indifferent to the need to prohibit it. Whether torture or indifference to it are due to cultural hostility; racial division; or the notion that torture is required by “noble cause” is irrelevant in this context. These factors alone, or severally, contribute to create a climate of impunity, and an impossibility of effective legal redress within that same state.

36. The veil of secrecy might be drawn back to some degree. It may assist the Committee to inquire of the UK authorities as to the:

- (a) Number of cases where the Immigration Authorities accepted that an individual had been tortured, or where policies were brought into being against refoulement of individuals belonging to specific groups owing to a risk of torture so that no judicial determination as to an entitlement to protection was required; and
- (b) Number of cases heard within the United Kingdom’s Immigration Courts each year in which a finding has been made that an individual has been tortured abroad;
- (c) Number of countries where the UK or the US State Department have recorded that there is a real risk of torture or impunity within a country.

This fact-finding exercise could properly be repeated *mutatis mutandis* with respect to the offences postulated within Article 7 or Article 8 of the Statute of the International Criminal Court.

The Foreign and Commonwealth Office could also provide information as to whether any of the criteria of this paragraph have been arguably engaged within a finite period—it is suggested that this could be the last five years.

37. The suggestion at paragraph 36 will not of course lead the Committee to a statistic upon which a prosecution “standard” could be based. It is recognised that the test applicable to the grant of protection by the Immigration Authorities (including Courts), is a lower test than would be required to secure a “criminal conviction”. It further must be borne in mind that a number of people will make false claims to having been tortured for their own purposes. The system is alive to this. Furthermore, the assessment of prevalence by reference to the grant of international protection is likely to underestimate the problem. (In law people who have been tortured will be returned to their home country if they have an option of internal relocation, or the risk of torture is deemed no longer to persist—a prosecution in those circumstances could still lie).

38. However blunt the statistic it is likely to throw into sharp relief the paucity of prosecution when compared to the real problem.

39. The question could equally be approached another way with a sadly current example. In Sri Lanka there has been a conflict for in excess of 20 years. In that time thousands of people have fled as Refugees to the United Kingdom and been granted international protection. A significant number of those people had been tortured.

40. The Home Office have repeatedly produced country assessments which have specified that torture can and does occur with impunity in Sri Lanka. The Home Office is not a lone voice to this. The United Nations High Special Rapporteur on Torture has repeatedly pointed out that torture is widespread in Sri Lanka, despite a legal regime which pays lip-service to prohibiting its use. (Appendix 5 contains evidence that can sustain this allegation).

41. Over the last months the Sri Lankan government has systematically used military force against the Tamil civilian population. There can be no question that the use of such force was anything other than intentional. It has attracted international condemnation. It provides a clear argument that Article 7 of the International Criminal Court’s Statute has been breached; and—or that Articles 8 (2)(a)(iv), 8(2)(B)(i), (ii), (iii), (iv), (v), (ix) have been similarly breached.

42. Within the last 20 years there is no known case of a Sri Lankan official having been prosecuted within the UK for Torture. The Committee might well ask, assuming the allegations are true, what prospect is there of any prosecutions being brought within the UK so as to convict any person responsible in law for the crimes that fall within this investigation?

**Letter to the Chair of the Committee from Claire Ward MP, Parliamentary Under Secretary of State,  
Ministry of Justice, dated 20 July 2009**

When I came to give evidence to the Joint Committee on 1 July, you asked that I write to you giving the relevant references from *Hansard* where the issue of retrospection was discussed during the passage of the then International Criminal Court Bill in 2001.

Peers discussed retrospection in a number of contexts. These included retrospection of the jurisdiction of the court, adding elements of crimes retrospectively, and retrospection of the domestic criminal offences. The issues does not appear to have attracted substantive discussion in the House of Commons. The memorandum to the Justice Committee did not properly distinguish between the different contexts and I apologise for this. In the event the Bill was passed without provision for retrospection.

The main points were made in the Lords on 15 January 2001, column 958, and 12 February columns 50, 54, 70, 72 and 82. Column 54 is the main one concerned with retrospection of the domestic legislation.

You also asked if the UK Government received any communication from the Saudi Government concerning the Jones litigation.

The Government, through the Department of Constitutional Affairs, intervened in the case of *Jones and Others v. Saudi Arabia* in order to ensure that the rules of international law on state immunity were fully and accurately presented. The Government did not intervene to support the Saudi Government, nor seek to justify the actions of its officials.

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